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No. 99-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

D.H.L. ASSOCIATES, INC.,

Petitioner,

v.

JOHN O'GORMAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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127 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals violated principles of judicial federalism when it refused to certify the state constitutional questions that are central to this case and instead decided the complex First Amendment issues presented even though (a) the federal court's judgment remands the state issues to the state court for determination and (b) the state court's judgment may well render the reported federal court decision advisory, all in violation of *Arizonans for Official English* v. *Arizona* and contrary to the decisions of the other Circuits.

2. Whether the Court of Appeals misconstrued *Renton* v. *Playtime Theatres, Inc.* and created a conflict among the Circuits when, in ruling on the constitutionality of a local zoning ordinance, it decided:

(1) that the "reasonable opportunity to open and operate" test should be applied according to facts as of the trial date, not the date four years earlier when the ordinance was enforced; and

(2) that the municipality met the "substantial governmental interest" test even though the town had given no consideration to secondary effects of adult entertainment at the time it adopted the ordinance challenged in this case, but rather

had given some consideration to secondary effects when it had adopted a previous ordinance.

LIST OF PARTIES

The petitioner here, which was the plaintiff in the district court and the appellant in the Court of Appeals, is D.H.L. Associates, Inc. D.H.L. Associates, Inc. has no parent or publicly held company owning 10% or more of the corporation's stock.

The respondents here, who were the defendants in the district court and appellees in the Court of Appeals, are John O'Gorman, Robert Wallace, Warren Allgrove, Jr. and Eileen Farrell, individually and in their dual capacities as the Tyngsborough Board of Selectmen and as the Licensing Board for the Town of Tyngsborough, and the Town of Tyngsborough.

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OPINIONS BELOW

The opinion of the Court of Appeals for the First Circuit is reported at 199 F.3d 50 (1999) and is reproduced as Appendix A, *post*, at App. 1a - 26a. The opinion and order of the United States District Court for the District of Massachusetts (Keeton, J.) is reported at 6 F.Supp.2d 70 (1998) and is reproduced as Appendix B, *post*, at App. 27a - 55a.

STATEMENT OF JURISDICTION

The Court of Appeals for the First Circuit issued its decision and entered judgment on December 17, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

1. Article 16 of the Massachusetts Declaration of Rights provides in pertinent part:

> The right of free speech shall not be abridged.

2. Article III, § 2 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] . . . to Controversies . . . .

3. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

4. Rule 1:03 of the Rules of the Massachusetts Supreme Judicial Court authorizes the certification of certain questions to that court and sets out the procedures for certifying those questions. The Rule is reproduced as Appendix D, *post*, at App. 56a - 58a.

STATEMENT OF THE CASE AND OF PRIOR PROCEEDINGS

(a) *Introduction*

The petitioner filed this case in state court challenging the constitutionality of a local zoning ordinance. The multi-count complaint raised state statutory and constitutional violations, as well as a single count under 42 U.S.C. § 1983. The defendants-respondents removed the case to federal court.[1] During the course of the litigation, the question repeatedly arose whether the federal court could decide the potentially dispositive state constitutional questions or should instead certify those questions to the state courts for resolution. In the end, the federal court did neither. Rather, it decided all the federal constitutional claims and

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[1] Subject matter jurisdiction was conferred on the district court by 28 U.S.C. § 1331 (federal question) and by 28 U.S.C. § 1343 (civil rights).

remanded the state claims to state court for trial and appeal.

In civil cases, when the federal courts are called upon to adjudicate state as well as federal claims, they must determine if, when, in what order, and by which court the respective state and federal claims should be addressed. In this case, the petitioner argued that the district court and, later, the Court of Appeals should certify the potentially dispositive state constitutional issues to the Massachusetts Supreme Judicial Court, where the decided cases clearly favor the petitioner's position although there is an absence of clearly controlling precedent. The federal courts, however, decided the First Amendment questions and remanded the state issues to the state courts for adjudication.

At present the case is pending in Middlesex County Superior Court, where the case originally was filed. A finding by the state courts that the ordinance violates the state constitution will render the federal judgment advisory.

In choosing this path for this litigation, the Court of Appeals (a) ignored the holding of this Court in *Arizonans for Official English v. Arizona*[2] which required certification of state law issues under circumstances similar to this case and (b) placed itself squarely in conflict with other circuits on the issue of certification of state constitutional claims. By refusing to certify the state law issues at the heart of this case, reaching the federal constitutional questions and leaving the state claims to be decided later, the First Circuit vio-

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[2] 520 U.S. 43, 75-80 (1997).

lated a fundamental principle of Article III jurisprudence — that federal courts must decline to decide federal claims when state claims are dispositive so as to avoid advisory opinions. Principles of judicial federalism impose on the federal courts the responsibility to refrain both from rendering advisory or unnecessary judgments on constitutional questions and from usurping the authority of state courts to interpret the state's constitution.

(b) *Prior Proceedings*

In early 1994, the petitioner began offering nude dancing entertainment to the adult public in Tyngsborough, Massachusetts (the respondents), a small town on the New Hampshire border north of Boston. App. 3a. In response to the "tremendous public reaction" in the town against nude dancing, the respondents enacted an ordinance that year placing two small parcels of land, totaling approximately ten acres, into an adult zone within which businesses offering adult entertainment must locate. App. 4a - 5a, & 78a. The petitioner's property was not included in those parcels. *Id.*

In May 1996, the respondents eliminated the two-parcel zone it had enacted in 1994. In its place, the town established a single parcel, 10.4 acre zone composed entirely of land owned by a single owner who had vociferously opposed adult entertainment at various town meetings and who had recommended that the adult zone be located at the town's landfill. App. 32a - 33a.

The petitioner has applied for an adult entertainment license, in accordance with state statute, each year since the creation of the 1994 and

1996 adult zones. The respondents have denied each application because the petitioner is not located in the adult zone. App. 4a - 5a.

On September 7, 1994, claiming violations of its free speech rights guaranteed by article 16 of the Massachusetts Declaration of Rights and a violation of 42 U.S.C § 1983, the petitioner brought an action in Massachusetts Superior Court against the respondents seeking declaratory and injunctive relief.[3]

(c) *State Law Developments During the Pendency of the Litigation*

Since 1978, article 16 of the Massachusetts Declaration of Rights has been construed to offer broader free speech guarantees for adult entertainment than the federal constitution. *See Commonwealth* v. *Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978) and *Cabaret Enterprises, Inc.* v. *ABCC*, 393 Mass. 13, 468 N.E.2d 612 (1984). Between the filing of the case in September 1994, and the decision of the Court of Appeals in December 1999, the petitioner's state claims were strengthened due to intervening significant developments in article 16 jurisprudence. On September 24, 1996, the Supreme Judicial Court decided *T & D Video* v. *City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996), and on January 14, 1999, it decided *A.F.M., Ltd.* v. *Medford*, 428 Mass. 1021, 704 N.E.2d 184 (1999). Both *A.F.M., Ltd.* and *T & D Video* present fact patterns extremely close

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[3] Respondents removed the case to federal court on November 23, 1994. Trial was held on April 29 - May 1, 1998 and judgment was entered on May 7, 1998. Timely notices of appeal were filed, and the Court of Appeals affirmed the judgment on December 17, 1999.

to this case. Both cases affirm that the state constitution provides greater protection to adult entertainment than the federal. Both cases allowed the adult entertainment club to operate.[4]

T & D Video v. *City of Revere*

In *T & D Video*, as in the present case, the municipality did not justify the enactment of its adult entertainment bylaw by reference to secondary effects either during pre-enactment hearings, during the meeting at which the bylaw was enacted,

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[4] Even the respondent's counsel grudgingly admitted during a pre-trial hearing that the 1996 Supreme Judicial Court decision in *T & D Video* was potentially dispositive of the case.

> [Resp's Counsel]: The plaintiff has as the central contention for those two motions [to remand and certify] the T & D Video case, which — we were discussing it before this hearing and I think the parties are in some agreement that that case is really central to where we are right now.

Counsel went on to argue that *T & D Video* should be considered a decision under the First Amendment and that the decision was wrong, to which the court replied,

> The Court: All right. But, you see, if you agree that the SJC, even if they were thinking of it in terms of federal constitutional law, decided squarely against your contention . . . when it's brought to their attention that the Supreme Court of the United States has issued recent decisions that are contrary to their interpretation of federal law; . . . I think it's much more likely that what they would do is say, "All right. We reach this decision under the state declaration of rights instead of the First Amendment. . . ."

App. 65a - 66a.

or within the text of the bylaw. On these facts, the Supreme Judicial Court held that the municipality "had failed to show that the adult entertainment ordinances were designed to serve a substantial governmental interest." 423 Mass. at 582, 670 N.E.2d at 166, *citing Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

The respondents in this case argued that the Supreme Judicial Court's decision in *T & D Video* was solely based on the First Amendment and that the Supreme Judicial Court had wrongly decided the case. The petitioner, citing the record of the case showing the trial court's reliance on article 16, maintained that *T & D Video* was part of the state's article 16 jurisprudence.

Under the First Amendment, as explicated by the First Circuit in this case, App. 16a - 19a, the lack of pre-enactment justification specific to the 1996 ordinance has no federal constitutional significance. However, if *T & D Video* articulates state law, the lack of pre-enactment justification is determinative of and fatal to the ordinance.

A.F.M., Ltd.* v. *Medford

In *A.F.M., Ltd.*, the question presented was whether a zoning scheme that confined adult businesses to 0.11 percent of the city's developable land provided the constitutionally required reasonable opportunity to open and operate. Concluding that that amount of land failed to meet constitutional minimums, the Supreme Judicial Court held that the regulatory scheme unreasonably foreclosed avenues of communication. This analysis of land availability, according to the First Circuit, App. 21a - 25a, is of minimal sig-

nificance under the First Amendment. However, again, if *A.F.M., Ltd.* sets forth state constitutional considerations and is not simply wrongly decided under the First Amendment, the percentage of land available is greatly important.

The adult zone in the present case contains less land than in *A.F.M., Ltd.* — approximately 0.10 percent of the land in the town. Accordingly, the petitioner is likely to prevail on its state claim under *A.F.M., Ltd.*

(d) *Decisions Below Regarding Certification*

After removal, the petitioner filed motions to remand or certify the state constitutional issues to the state courts.[5] The district court ultimately decided against certification, opting instead to reach the complex First Amendment issues. As late as the middle of the trial, however, it expressed concern about the predominant role of the state constitutional claims in the case.

> Now, you [petitioner's counsel] [ha]'ve referred to state law . . . . [I]t seems to me that even at this late stage, perhaps the appropriate decision for me if I conclude you have a claim on that basis would be to remand this case to the superior court for that

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[5] See Motion by DHL to Remand Case to State Court, App. 59a - 60a; Motion by DHL that the Court Invoke *Pullman* Abstention and Remand the State Law Questions to State Court or to Certify State Law Questions to the Supreme Judicial Court, App. 61a - 63a; Colloquy with the Court during argument on DHL's Motion for Summary Judgment, App. 64a - 67a; Colloquy with the Court during the trial, App. 71a - 77a.

> court's evaluation and determination of your claim as to whether you're right on your state law contention. That would make a lot more sense than my deciding it. And then either after I have decided it, certify[ing] to the SJC [to ask] did I get it right or else letting you appeal to the First Circuit and the First Circuit would then certify to the SJC very likely[--] did the trial judge get it right that this is a matter of state law.

App. 75a.

After trial, the district court entered a final judgment which reached the federal constitutional claims and decided them adversely to the petitioner. App. 55a. The court also remanded the state law claims to Middlesex County Superior Court. *Id.*

With regard to certification, the Court of Appeals ruled that

> [b]ecause we are not convinced that state law provides an independent and sufficient basis for deciding the case, we conclude that the district court did not err by remanding the case to state court for determination of [the Petitioner's] remaining state law claims after its adjudication of the federal issues.

App. 25a.

The irony of this case is that the federal court's remand to state court has the same effect as certification, i.e., it requires the state courts to resolve the state law questions, but it does so in a way that inverts the traditional order of constitutional decision making. Here, the federal constitutional questions have been decided first, and the opinion is at serious risk of being rendered advisory if and when the state court comes to a different result under state law.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICATION OF *ARIZONANS* AND TO DETERMINE WHETHER FEDERALISM AND COMITY REQUIRE THAT FEDERAL COURTS DEFER DECIDING FEDERAL CONSTITUTIONAL ISSUES WHEN CERTIFICATION OF STATE CONSTITUTIONAL ISSUES WOULD PERMIT THE STATE COURTS TO RESOLVE THE LITIGATION IN FULL ON STATE GROUNDS.

A. *Arizonans* requires certification when dispositive but unresolved issues of state law are joined with federal constitutionally based causes of action.

In *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 75-80 (1997), this Court rechristened *Pullman*[6] abstention as "certification" and elevated the doctrine to one of central importance in cases involving federal constitutional issues.

> In litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary? When anticipatory relief is sought in federal court against a state statute, respect

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[6] *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

> for the place of the states in our federal system calls for close consideration of that core question.[7]

Arizonans, 520 U.S. at 75 (1997).

In *Arizonans*, Justice Ginsberg noted that "[c]ertification today covers territory once dominated by a deferral device called '*Pullman* abstention. . . .'" *Id.*

> Through certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save "time, energy, and resources and hel[p] build a cooperative judicial federalism."

520 U.S. at 77 (citations omitted).

The *Arizonans* Court reversed the lower courts' refusals to certify to the Arizona Supreme Court the question of the interpretation of a new article to the state's constitution which made English the official language of the state. The decisions of the lower federal courts instead reached and decided the plaintiff's First Amendment claim. The Supreme Court ruled that rather than prematurely reaching the federal constitutional issue, "[a] more cautious approach was in order," and that "the certification requests merited more respectful

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[7] "Federal courts abstain out of deference to the paramount interests of another sovereign, and the concern is with principles of comity and federalism." *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 723 (1996).

consideration than they received . . . ." *Id.* at 77, 78.

In *Arizonans*, this Court, it appeared, had resolved the questions of the manner and order in which a federal court should address state and federal constitutional questions when the state law question is unsettled and potentially dispositive. This Court ordered certification.

B. The criteria for certification set out in *Arizonans*, that the state law questions potentially be dispositive and that they involve issues of unsettled state law, are met in this case.[8]

1. The state law questions are potentially dispositive.

The first requirement for certification is that an authoritative answer to the state law question may render moot the deferred federal constitutional question. *Arizonans*, 520 U.S. at 78-79. If the case can be decided on the basis of state law, then the "cardinal principle" that a federal court should avoid unnecessarily reaching federal con-

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[8] An additional requirement is that the state courts either have an established mechanism for or otherwise permit certification. The Massachusetts Supreme Judicial Court has had a rule providing for certification since the early 1970's. See Rules of Massachusetts Supreme Judicial Court 1:03 (2000), App. 56a - 58a; *Bellotti* v. *Baird*, 428 U.S. 132, 150-51 (1976).

stitutional questions is well served. *Id.*[9], [10] "Such [federal] constitutional adjudication plainly can be avoided if," as here "a definitive ruling on the state issue would terminate the controversy." *Pullman*, 312 U.S. at 498.[11]

The standard regarding this criterion for certification is that there must be a "fair possibility" that state law will be dispositive. *Iberra* v. *Bexar County Hospital District*, 624 F.2d 44, 47 (5th Cir. 1980). Certainty is not required. Indeed, certainty would defeat the need for certification because when the state law is reasonably clear, the federal courts routinely will decide the state issue.

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[9] The state constitutional law question is whether the local ordinance violates the petitioner's free expression rights guaranteed by article 16 of the Massachusetts Declaration of Rights. That issue could be resolved by a certified question as simple as: Were *T & D Video* and *A.F.M., Ltd.* decided under article 16? If the answer were in the affirmative, then this case is resolved. The respondent's position, which was critically questioned by the district court, see *supra* n.4, has been that the two cases were decided under the First Amendment only, that the Supreme Judicial Court decided them incorrectly, and that when this error is brought to the Supreme Judicial Court's attention, it will decide that art. 16 does not provide greater protection for adult entertainment and that its decisions in these two cases were wrong under both federal and state law.

[10] As the Court recently reiterated in *Clinton* v. *Jones*, 520 U.S. 681, 690 n.11 (1997), "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable,' *Spector Motor Service* v. *McLaughlin*, 323 U.S. 101, 105 (1944);" and "It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case.' *Burton* v. *United States*, 196 U.S. 283, 295 (1905)."

[11] During the litigation, the respondent's counsel had conceded the importance of the state constitutional claims. *See infra* n.4.

Here, the state court decisions in *T & D Video* and *A.F.M., Ltd.* provide the basis for a strong argument that the adult zone violates the Massachusetts Declaration of Rights.

2. The issues involve unsettled questions of state law.

The second requirement for certification is that the issues involve unsettled questions of state law. Although the petitioner has a strong state constitutional argument, the results of that argument remain uncertain for several reasons. First, the full contours of the protections offered by article 16 are not clear. *T & D Video* and *A.F.M., Ltd.*, in conjunction with *Redgrave* v. *Boston Symphony Orchestra*, 855 F.2d 888 (1st Cir. 1988), *Commonwealth* v. *Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978) and *Cabaret Enterprises, Inc.* v. *ABCC*, 393 Mass. 13, 468 N.E.2d 612 (1975), indicate that article 16 provides greater protection for adult entertainment than the First Amendment. Both *T & D Video* and *A.F.M., Ltd.*, however, arose in the context of motions for a preliminary injunction, without the benefit of a fully developed trial record. The full parameters of these decisions thus may be left for further explication by the Supreme Judicial Court after trial. Second, the Massachusetts courts must address the respondents' contention in this case that *T & D Video* and *A.F.M., Ltd.* were decided under the federal constitution only. App. 65a.

The fact that the state law issues have been remanded to the state courts for resolution attests to the uncertain boundaries of article 16 jurisprudence and the importance of these state law

questions to this case. Under these circumstances, where the requirements for certification are met, the lower courts erred in refusing to certify the state law issues.[12]

C. The First Circuit's decision is in direct conflict with other Circuits and with prior decisions of this Court.

The First Circuit decision on certification conflicts not only with *Arizonans*, but also with longstanding and clearly enumerated principles of federalism and other decisions of this court. *Meridian v. Southern Bell Telephone and Telegraph Co.*, 358 U.S. 639 (1959), for example, involved a

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[12] Prior to *Arizonans*, many of the Circuits, including the First, *Pustell* v. *Lynn Public Schools*, 18 F.3d 50, 53 (1st Cir. 1994), had limited certification to cases with exceptional or unique circumstances. In *Arizonans*, this Court rejected that standard, holding that"[n]ovel, unsettled questions of state law . . . not 'unique circumstances,' are necessary before federal courts may avail themselves of state certification procedures." *Arizonans*, 520 U.S. at 79.

Like Arizona, Massachusetts does not require unique circumstances. Certification is permitted of matters "which may be determinative of the cause," and as to which "no controlling precedent" is apparent. Rules of the Massachusetts Supreme Judicial Court 1:03. App. 56a.

As pointed out by the Court in *Arizonans*, the

> [c]ertification procedure, in contrast [with abstention], allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response.

Arizonans, 520 U.S. at 76.

challenge under both the state and federal constitutions to a state statute that imposed a charge on public utilities for the use of public streets. There, as here, the lower federal court reached and decided the federal constitutional claim. This Court remanded the case to the District Court with directions "to hold the cause while the parties repair to a state tribunal for an authoritative declaration of applicable state law." *Id.* at 640. There, as here, the authoritative declaration in the state tribunal would address the question of the validity of the local law under the state constitution. The court in *Meridian* was clearly concerned that by failing to defer to the state tribunal, the federal courts, as here, risked "render[ing] a constitutional decision unnecessarily." *Id.* at 641. *See also Reetz* v. *Bozanich*, 397 U.S. 82, 85 (1970).

Both the Eleventh and Ninth Circuits have ordered certification in cases which, like the present, involve potentially divergent conclusions under the respective state and federal constitutional provisions. In *Fields* v. *Rockdale County Georgia*, 785 F.2d 1558, 1561 (11th Cir. 1986), for example, certification of the state constitutional issue was required because the due process provision of the Georgia constitution, at issue in that case, affords broader protection than its federal constitutional counterpart. Similarly, in *Newport Investments, Inc.* v. *City of Laguna Beach*, 564 F.2d 893, 894 (9th Cir. 1977), the federal court ruled that certification was required because "some of the appellant's claims were predicated on some of the California Constitution's 'mirror image' provisions of the Federal Constitution." Thus, the court ruled, "it was particularly appropriate that the California courts be afforded

the initial opportunity of interpreting the constitution of their own state in relation to the appellant's complaint." *Id.*

The First Circuit's approach in this case contradicts the holdings of the Ninth and Eleventh Circuits regarding certification and is at odds with this court's holdings in *Arizonans* and *Meridian*. We urge this Court to reconcile the conflict among the Circuits and provide uniform standards for deferral of federal constitutional questions when a potentially dispositive state constitutional provision is before the federal court.

D. Article III's case or controversy requirement and principles of federalism required certification in order to allow the state court to resolve the state constitutional issues.

Article 16 of the Massachusetts Declaration of Rights provides broader free speech protections than the First Amendment. The development of an article 16 jurisprudence[13] is consistent with

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[13] *See Sees* (art. 16 protected nude dancing in bars that serve alcoholic beverages whereas the First Amendment does not, *Doran* v. *Salem Inn, Inc.*, 422 U.S 922, 932-34 (1975)); *Cabaret Enterprises, Inc.* v. *ABCC*, 393 Mass. 13, 468 N.E.2d 612 (1984)(same); *A.F.M., Ltd.*, 428 Mass. 1021, 704 N.E.2d 184 (interpreting *Renton* more broadly than the federal courts) and *T & D Video*, 423 Mass. 577, 670 N.E.2d 162 (same). *See supra* Part (c) of the Statement of the Case and of Prior Proceedings. Similarly, in *Redgrave, supra* 855 F.2d at 910, the First Circuit explicitly acknowledged that article 16 provides broader protection for nude dancing than the First Amendment.

In *Commonwealth* v. *Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985), the Supreme Judicial Court explained the reason that state constitutional protections differ from the federal as follows:

the Massachusetts Supreme Judicial Court's general view that it is obligated to independently interpret the state's constitution.[14]

The creation of an independent free speech jurisprudence has already placed the decisions of the Supreme Judicial Court under article 16 in conflict with the decisions of this Court under the First Amendment. *Compare Sees*, 374 Mass. 532, 373 N.E.2d 1151 with *Doran* v. *Salem Inn, Inc.*,

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> The Constitution of the Commonwealth preceded and is independent of the Constitution of the United States. In fact, portions of the Constitution of the United States are based on provisions in the Constitution of the Commonwealth. . . . In particular situations, on similar facts, we have reached different results under the State Constitution from those that were reached by the Supreme Court of the United States under the Federal Constitution. On occasion, the differences can be explained because of different language in the two Constitutions. [Citing *Sees*]. On the other hand, in deciding similar constitutional questions, the two courts have reached contrary results based on differences of opinion concerning the application of similar constitutional principles.

Id. at 372, 476 N.E.2d at 555.

[14] *See* Speer, B., Chief Justice Wilkins and the Criminal Law, 80 Mass.L.Rev. 125, 126-33 (Winter 1999)(citing numerous cases where the Supreme Judicial Court extended greater protections under the state constitution than is afforded by the cognate federal constitutional provisions); Clay, H., Human Freedom and State Constitutional Law, 70 Mass.L.Rev. 161, 163 (Dec. 1985)(same regarding other states); Utter, Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights, 7 Puget Sound L.Rev. 491, 499 n.29 (1984)(listing states that have interpreted their constitutions as providing greater protection for individual rights than the federal constitution).

422 U.S 922, 932-34 (1975). *See supra* n.13. As the present case attests, further conflicts in the interpretation of these cognate free speech provisions are likely to occur.

In cases, as here, which present both state and federal constitutional claims, where the state claims may well be dispositive, Article III of the United States Constitution dictates that the state issues must be decided first, and federalism dictates that that issue must be decided in the first instance by the state court.

1. Article III requires the federal courts to avoid advisory opinions by deferring federal constitutional claims when the case can be decided on other grounds.

Article III limits federal court jurisdiction to cases or controversies and precludes advisory opinions. *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-69 (1947)("this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications . . . arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case or controversy limitation. U.S. Const. Art. 3."). An established decisional hierarchy aids courts in avoiding advisory opinions. When a court decides a case by construing the common law or interpreting a regulation or a statute, the constitutional issue, in effect, becomes moot; a constitutional case or controversy no longer exists. *Id.* Accordingly, when, as here, a federal court is faced with both a

federal constitutional claim and a cognate claim under the state constitution, Article III of the United States Constitution requires that the state claim must be resolved first. *Id.*

When the federal court, as in this case, acts to the contrary and decides the federal constitutional question before the state constitutional issue is even considered, it runs afoul of Article III by having rendered an opinion that very well may become advisory, a result that Article III forbids. Certification is the process by which federal courts can avoid this prohibited result.

2. The principle of judicial federalism requires the state courts to initially decide state constitutional questions.

This Court's cases from *Pullman* through *Arizonans* uniformly have championed the position that federalism requires a "'scrupulous regard for the rightful independence of the state governments,'" *Pullman*, 312 U.S. at 501 (citation omitted), and deferral of federal constitutional decisions "further[s] the harmonious relation between state and federal authority," *id.*, by the "'avoidance of needless friction' between federal pronouncements and state policies," *Reetz* v. *Bozanich*, 397 U.S. 82, 87 (1970) *quoting Pullman*, 312 U.S. at 500.

That the state courts should have both the first and the last word in interpreting state law — one of the grounding principles of both *Pullman* abstention and certification — is based on the fundamental rationale that federalism demands that

the federal government must respect the sovereignty of the several states. By allowing the state courts to interpret their own constitutions and laws, and not attempting to predict what that interpretation might be, the federal courts not only honor state sovereignty, but also avoid the potential for conflicting results between those sovereigns. The principle incorporates the commonsense notion that state courts have a greater expertise in interpreting their law than do the federal courts. The need for federal courts to defer to the states is, of course, particularly acute when the cognate provisions of the state and federal constitutions diverge.

In the last two decades, independent interpretation of state constitutions has undergone a renaissance. Prior to that time, the likelihood of conflicting interpretations of cognate federal and state constitutional provisions was small. Almost all state courts had interpreted their constitutions as affording the same and no greater protection than that afforded by the federal constitution. With independent state constitutional interpretations becoming the norm, the chances for conflicting interpretations have increased. *See generally supra* n.14.

Where, as here, the relevant state constitutional provision provides broader protection for individual rights than the First Amendment, and the federal court not only recognizes this jurisprudential difference but also determines that there is no compelling state precedent on the specific case before it,[15] then principles of federalism, as articulated in *Pullman* and reaffirmed in *Arizo-*

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[15] See Rule 1:03 of the Rules of the Supreme Judicial Court.

nans, require the federal court to certify the state constitutional question.

E. The federal courts should deter to the state courts in areas of sensitive social policy.

One final consideration bears note. Federal courts ought not to enter sensitive areas of social policy that are best left to resolution by the states unless no alternative to its constitutional adjudication is open. *Pullman*, 312 U.S at 498. The Courts of Appeal have found certification to be particularly appropriate in zoning, eminent domain, *Fields* v. *Rockdale County Georgia*, 785 F.2d 1558, 1562 (11th Cir. 1980), and education cases, *Pustell* v. *Lynn Public Schools*, 18 F.3d 50, 54 (1st Cir. 1994) — areas of law that traditionally have been reserved to the state courts.

The present case not only concerns the traditionally local issue of zoning but also involves strong local feelings touching on the less quantifiable, but nevertheless distinctly local, areas of morality and values. App. 3a - 4a & 81a.

In a case such as this, principles of federalism empower the state courts, not the federal, to render a decision on state law. Federal courts should not create the potential for conflict between the sovereigns that necessarily will result if and when it turns out that the federal courts prematurely have rendered a constitutional opinion that is advisory only.[16] Certification was required.

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[16] As recited above, the petitioner brought this case in the state court. After the defendants removed the matter to federal court,

II. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS FAILED TO PROPERLY APPLY THE SUBSTANTIAL GOVERNMENTAL INTEREST AND REASONABLE OPPORTUNITY TO OPEN AND OPERATE TESTS UNDER *RENTON* V. *PLAYTIME THEATRES, INC.*, PLACING ITS DECISION IN CONFLICT WITH *RENTON* AND THE OTHER CIRCUITS.

A. The lack of opportunity to open and operate should have been determined as of the time the permit at issue in the case was denied.

The Court of Appeal's finding that the 1996 adult entertainment zone provided the petitioner with a reasonable opportunity to open and operate under *Renton* is premised upon the incorrect supposition that the constitutionality of the respondents' zoning ordinance was to be examined as of the date of the trial, not as of the date the permit was denied.[17] See App. 46a. This asser-

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the petitioner repeatedly tried to have the case remanded, or questions certified, to the state court.

[17] Testifying at trial, the owner of the adult zone land admitted that up to the date of trial none of the land in the zone was available for sale.

> Q. Now, with regard to the adult entertainment zone, those would be lots 14, 15, 16, 17 and a part of 13, is that correct?
>
> A. That is correct.
>
> Q. Have any of those parcels been available for purchase to date?

tion is simply incorrect. There is no support for this view in any case.

The question under *Renton* is whether the challenged ordinance provided the applicant a reasonable opportunity to open and operate at the time that the request to provide adult entertainment was denied. The answer to this question in this case is clearly "no."

As of December 1996, the date when the petitioner applied for and was denied an entertainment license to include nude dancing, the respondents' adult entertainment zone consisted entirely of one 10.4 acre parcel under single ownership. App. 82a - 84a. That 10.4 acre parcel was virtually identical to the "one-available-lot" 1994 zone that the District Court found was most likely unconstitutional under *Renton*. App. 47a.[18]

Courts have grappled with the potential ambiguity of the controlling legal standard, "a reasonable opportunity to open and operate," but no court has upheld a zoning regulation where one parcel, comprising less than one-tenth of one percent of the land area in a municipality, was available for use by an adult entertainment establishment.[19]

A. No, they haven't been.

App. 69a. The land owner went on to testify that as of the day of trial, the parcels were available for sale. In its decision, the trial court credited this testimony and relied on the fact that the land was for sale as of the day of trial for its conclusion that the zone provided a reasonable opportunity for adult businesses to open and operate. App. 46a.

[18] In addition, as of December 1996, the adult zone parcel was not available for purchase. *See supra* n.17 and App. 68a - 71a.

[19] *CLR Corp.* v. *Henline*, 702 F.2d 637, 638 (6th Cir. 1983) (zoning ordinance unconstitutional where "the impact of the . . . ordi-

Under *Renton*, therefore, as of the date that the petitioner applied for its adult entertainment license, the respondents' adult zone did not provide a reasonable opportunity for an adult business to open and operate. By conducting the *Renton* analysis as of the time of trial, the Court of Appeals misapplied *Renton* and fell out of step with the other circuits.

B. The municipality failed to offer proof of a substantial governmental interest.

Renton v. *Playtime Theatres, Inc.*, 475 U.S. 1 (1986) requires a municipality to have considered evidence that demonstrates its substantial governmental interest when it enacts an ordinance that restricts expressive activities, including adult entertainment. Here, the town presented no evidence of any governmental interest at the time it enacted its 1996 adult entertainment ordinance. App. 83a. The Court of Appeals ruled that the

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nance is to permit two to four restricted uses in a half-mile strip of the city"). *Walnut Properties, Inc.* v. *City of Whittier*, 861 F.2d 1102, 1110 (9th Cir. 1988) (100 acres of land comprising only 1.4 percent of the city's land area in three areas was insufficient); *DIA* v. *City of Toledo*, 937 F.Supp. 673, 678 (N.D. Ohio 1996) ("courts have generally found the number to be inadequate if fewer than a dozen sites or under one percent of the city acreage is potentially available"); *Janra Enterprises* v. *City of Reno*, 818 F.Supp. 1361, 1364 (D. Nev. 1993) (three parcels "is hardly constitutionally sufficient for alternative means of communication"); *cf. 3570 East Foothill Boulevard* v. *City of Pasadena*, 912 F.Supp. 1257, 1266-67 (D.C. Cal. 1995) (0.73 percent of the land available for adult businesses does not automatically violate *Renton*, where a jury could find that there were 26 sites or a minimum of 11 to 16 sites, as the plaintiff conceded).

lack of evidence was constitutionally insignificant. The court reasoned that because the respondents had shown a substantial governmental interest in enacting an earlier adult entertainment ordinance, the town, as a matter of law, could graft this earlier finding onto the new ordinance. App. 19a.[20]

This reasoning, however, not only misconstrues the purpose of *Renton's* substantial government interest requirement but also conflicts with two recent cases, *J & B Entertainment, Inc.* v. *City of Jackson, Miss.*, 152 F.3d 362 (5th Cir. 1998) and *N.W. Enterprises, Inc.* v. *City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), both of which expressly considered and rejected this very argument.

In *J & B Entertainment, Inc.*, the municipality, like the respondents here, presented no evidence at trial as to its motives in amending its zoning ordinance in 1995 to restrict adult entertainment. Rather, like the respondents here, the municipality claimed that it was sufficient for it to prove that there had been a substantial governmental interest in the adoption of an earlier (1991) zoning ordinance restricting adult entertainment.

The Fifth Circuit rejected that argument. It found that because *Renton*

> instructs us that a government must present . . . "a link between the regu-

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[20] We note again that the result in the governing state decision, *T & D Video*, 423 Mass. at 581-82, 670 N.E.2d at 165-66, is both contrary to the First Circuit's holding in this case and consistent with the Fifth Circuit's analysis in *J & B Entertainment*.

> lation and the asserted governmental interest,"[21]

mere reliance on

> the inference that [the municipality] must have had the same interests because the composition of the City Council that enacted the Ordinance was the same as the City Council that enacted the 1991 zoning ordinance[22]

was inadequate.[23] The fact that an earlier zoning ordinance restricting adult entertainment may have been enacted with a proper motive is no guarantee under *Renton* that a later ordinance, although similar in form, was also enacted with a constitutionally proper motive.[24] Each and every

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[21] *Id.* at 372.

[22] *Id.* at 374.

[23] [W]e will not hypothesize such an objective or accept a naked assertion. Rather, we intrude into the regulatory decision process to the extent that we insist upon objective evidence of purpose — a study or findings. Insisting upon findings reduces the risk that a purported effort to regulate effect is a mask for regulation of content.

Id. at 372.

[24] Prudence also suggests that making the entire determination of whether a challenged ordinance is constitutional hinge upon the prior experiences of legislators, absent reasoned explanation, is unwise. While the district court's conclusion that the prior experiences of legislators can justify a challenged ordinance without reasoned explana-

ordinance restricting adult entertainment must serve a substantial governmental interest--not just the first one. Later ordinances restricting adult entertainment do not gain immunity from scrutiny simply because the first ordinance was enacted constitutionally.[25]

Accordingly, the Court of Appeal's conclusion that the respondents had shown a substantial governmental interest in enacting the 1996 ordinance by relying on evidence submitted in connection with an earlier ordinance is in conflict with *Renton* and the rule of *Renton* as applied by the Fifth Circuit. In order to reconcile the conflict among the Circuits, certiorari should be granted.

> tion linking the earlier enactment to the challenged ordinance may be easily applied in this case, we may quickly become bogged down in a morass of line-drawing in future cases. First, what if some but not all of the legislators have previously received information on secondary effects. How many are enough? Half? Two-thirds? How long can pass between the review of the materials and the challenged ordinance? What if the applicable law has changed in the interim?

J & B Entertainment, Inc., 152 F.3d at 375.

[25] See *N.W. Enterprises, Inc.* v. *City of Houston*, 27 F.Supp.2d 754 (S.D. Tex. 1998), where the municipality, like the respondent here, attempted to rely on evidence of secondary effects introduced during passage of an earlier ordinance to substantiate the governmental interest in enacting a later ordinance. "[E]ach time a City chooses to impose new restrictions of protected speech such as [the municipality] has done by increasing the ordinance's distance requirement for sexually oriented businesses, it must satisfy the requisite constitutional test." *Id.* at 811.

CONCLUSION

This case presents fundamental questions regarding the relationship between the state and federal courts. We urge this court to grant certiorari to remedy the constitutional conflict engendered by the decision of the First Circuit not to defer the federal constitutional decisions until the state law issues were resolved and to provide guidance to the lower federal courts on the important federal question of the proper role of certification when potentially determinative, but not clearly established, state constitutional issues come before them.

Respectfully submitted,

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APPENDIX A

D.H.L. ASSOCIATES, INC.,
Plaintiff, Appellant,

v.

JOHN O'GORMAN, Robert Wallace, Warren Allgrove, Jr, and Eileen Farrell, Individually and in their Capacity as The Tyngsborough Board of Selectmen, and as the Licensing Board for the Town of Tyngsborough, and the Town of Tyngsborough, Defendants, Appellees.

No. 98-1688.

United States Court of Appeals,
First Circuit.

Heard Sept. 16, 1999.
Decided Dec. 17, 1999.

Restaurant owner brought state court action against town and town officials, challenging municipal ordinance regulating adult entertainment businesses and seeking declaratory relief on federal and state constitutional grounds. Defendants obtained removal. The United States District Court for the District of Massachusetts, Robert E. Keeton, J., 6 F.Supp.2d 70, held ordinance to be constitutional, and owner appealed. The Court of Appeals, Coffin, Senior Circuit Judge, held that:

(1) owner's claims were ripe for review; (2) owner's challenges to former versions of ordinance were moot; (3) present ordinance was content neutral; (4) ordinance was narrowly tailored to serve substantial government interest; and (5) ordinance permitted reasonable alternative avenues of communication.

Affirmed.

Thomas Lesser with whom William C. Newman was on brief for appellant.

Richard Bowen with whom Jonathan M. Silverstein and Christopher J. Pollart were on brief for appellees.

Before SELYA, Circuit Judge,
COFFIN, Senior Circuit Judge, and
LIPEZ, Circuit Judge.

COFFIN, Senior Circuit Judge.

Plaintiff-appellant D.H.L. Associates, Inc., has sought annually since 1994 to persuade defendants-appellees, the town of Tyngsborough, Massachusetts, and its board of selectmen to license it to provide nude dancing at its restaurant, "Matthew's." D.H.L. has never been successful in this endeavor because Matthew's is not located within the area of Tyngsborough zoned to allow adult entertainment. In this case, D.H.L. challenges the constitutionality of Tyngsborough's zoning ordinance, alleging that even as revised since 1994, it

does not meet the standards set forth in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), and thus violates D.H.L.'s constitutionally protected freedom of speech. The district court held the ordinance to be constitutional, and from that judgment D.H.L. appeals. Finding no constitutional infirmity in Tyngsborough's zoning ordinance, we affirm.

I. *Factual Background*

Tyngsborough, a rural town of approximately 9500 inhabitants, is located about 40 miles from Boston near the Massachusetts/New Hampshire border. The Tyngsborough board of selectmen acts as the town's executive branch and is authorized to act as the licensing authority for alcoholic beverage and entertainment licenses. Town residents voting at meetings constitute the legislative branch of the town's government and as such are responsible for enacting the zoning ordinances at issue here.

The Town has altered its zoning ordinance multiple times in the past decade. In 1987, the Town, by a vote of the majority of residents at a town meeting, established the "B-4 zone," in which adult entertainment, as well as other commercial uses, was authorized. The B-4 zone, although existing in theory, did not actually contain any parcels of land and was, in fact, a "phantom zone." In 1992, D.H.L. applied for and was issued both an all- alcoholic beverage license and a live enter-

tainment license for its restaurant called "Bogie's," later called "Matthew's," located in a general commercial use zone.

In January 1994, D.H.L. advertised that it would present nude dancing beginning in February. The following month, an open town meeting was held in Tyngsborough to discuss adult entertainment and on February 24, the Town notified D.H.L. that adult entertainment was not encompassed within its entertainment license. On March 7, D.H.L. applied to amend its entertainment license to include adult entertainment, under protest based on its belief that its entertainment license inherently authorized adult entertainment. On March 28, the board of selectmen held a hearing to consider D.H.L.'s request, but delayed a decision. The next evening, as a result of a petition signed by more than 650 registered voters, a special town meeting was held to consider adopting an ordinance that would prohibit establishments holding liquor licenses from offering any form of nude entertainment.

Although the Town did not adopt such an ordinance, town residents at the meeting unanimously adopted an amended version of the zoning ordinance to establish a B-4 zone of two lots of land. The selectmen subsequently denied D.H.L.'s application to amend its entertainment license to include live nude dancing on the basis that the restaurant was not located within the B- 4 zone. Each year since then, the Town has reissued D.H.L.'s entertainment license but refused to ex-

tend it to include nude dancing. Aside from a two-day license suspension in March 1994, the Town has never attempted to enforce the limitations of D.H.L.'s license or otherwise sanction it for its violation of zoning and licensing regulations, despite the fact that D.H.L. has continued to offer nude dancing on a daily basis. The Town has, however, represented to D.H.L. and to this court that it is delaying enforcement only until this litigation concludes.

In 1994, D.H.L. filed a claim against the Town and its board of selectmen in state court, alleging, inter alia, that its state and federal constitutional rights had been violated and seeking declaratory and injunctive relief as well as damages. Defendants successfully sought removal of the case to federal court.

Prior to trial, at a town meeting in May 1996, the Town established an entirely different B-4 zone comprised of 10.4 acres and consisting of 5 of the 24 lots in Applewood Commercial Park subdivision. It was the constitutionality of this zone that the district court upheld following a bench trial in April 1998. The district court ruled in favor of Tyngsborough on D.H.L.'s federal constitutional claims, on the grounds that the constitutionality of the 1987 and 1994 zones were moot issues and the 1996 zone was constitutional, and remanded D.H.L.'s remaining state claims to state court for adjudication. D.H.L. appeals, arguing that the issue of whether its rights were violated under the prior ordinances was not moot and that

even if the 1996 ordinance were the appropriate benchmark for consideration, it was not constitutional.

II. *Preliminary Issues*

A. *Ripeness*

[1] Initially, we were concerned that D.H.L.'s claims were not ripe for review because D.H.L. has continued to provide adult entertainment despite its lack of a license without sanction. We have resolved this concern, however, because the Town has represented to the court, consistent with a selectman's testimony at trial, that it is delaying enforcement of the ordinance against D.H.L. only until this litigation concludes. Our jurisdiction as a federal court extends only to "cases" and "controversies," as authorized by Article III, Section 2, of the United States Constitution. This means that issues before us must reflect a live dispute between adverse parties.

The Supreme Court has explained that the determination of ripeness depends on "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

[2] In situations similar to the present one, prospective enforcement of an ordinance has been found sufficient to generate a live case. *See, e.g., Sable Communications of California, Inc. v. Pacific*

Tel. & Tel. Co., 890 F.2d 184, 187 (9th Cir.1989) ("A threat that emanates from a regulation, compulsory in nature, to which the plaintiff is currently subject, is real and immediate if the possibility of enforcement is more than hypothetical."). When a constitutional claim is at issue, a plaintiff need not "await the consummation of the threatened injury to obtain preventive relief." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 67 L.Ed. 1117 (1923).

In this case, it is clear that D.H.L. is subject to a real and immediate threat of enforcement of Tyngsborough's zoning ordinance and therefore its claims are ripe for our consideration. *See Pustell v. Lynn Pub. Schs.*, 18 F.3d 50, 52 (1st Cir. 1994); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 218 (3d Cir.1988).

B. *Mootness*

[3] Next, we address D.H.L.'s argument that the district court erred by holding that the constitutionality of the 1987 and 1994 zones were moot issues. D.H.L. contends that these issues are, in fact, dispositive of the case. We review the court's determination of mootness *de novo*. *See Verhoeven v. Brunswick Sch. Comm.*, 1999 WL 721698, *4 (lst Cir. Sept. 21, 1999).

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944,

23 L.Ed.2d 491 (1969). The Supreme Court has described mootness as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue through its existence (mootness).'" *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980) (quoting Henry P. Monaghan, "Constitutional Adjudication: The Who and When," 82 Yale L.J. 1353, 1384 (1973)).

We conclude that the validity of the 1987 and 1994 ordinances are moot issues because even if we were to find the provisions unconstitutional, D.H.L. would not be entitled to any relief. First, D.H.L. cannot allege damages from the application of the 1987 or the 1994 ordinance because neither was ever enforced against D.H.L. Although D.H.L. was denied a permit under the authority of the 1994 ordinance, it continued to engage in the prohibited conduct on a daily basis without repercussion. Although a claim for damages from a no longer effective ordinance might in other circumstances save the issue of the ordinance's lawfulness from a determination of mootness, D.H.L. can make no such claim here. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 478 n.1, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (plaintiff's claims not moot even though challenged ordinance repealed because town refused to grant contracts to plaintiff while ordinance was in effect).[1]

---

[1] Although D.H.L. initially requested monetary damages from the board of selectmen, it withdrew that claim in light

Second, we are without power to grant injunctive and declaratory relief because the 1987 and 1994 ordinances no longer exist. In *Diffenderfer v. Central Baptist Church, Inc.*, 404 U.S. 412, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972), the Supreme Court emphasized that it had to "review the judgment of the district court in light of [state] law as it now stands, not as it stood when the judgment below was entered." *See id.* at 414-15, 92 S.Ct. 574 (holding that when the only relief sought was a declaratory judgment that a statute was unconstitutional, but the statute was repealed pending appeal, the case was moot). The Court has also stated that when a challenged federal statute is amended after review by courts of appeals, the issues presented to the Supreme Court on appeal are rendered moot. *See United States Dep't of Justice v. Provenzano*, 469 U.S. 14, 15, 105 S.Ct. 413, 83 L.Ed.2d 242 (1984); *see also Burke v. Barnes*, 479 U.S. 361, 363, 107 S.Ct. 734, 93 L.Ed.2d 732 (1987) (finding that case was moot when bill at issue expired after the court of appeals entered judgment and stating that "it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing"); *United States Dep't of the Treasury v. Galioto*, 477 U.S. 556, 559-60, 106 S.Ct. 2683, 91 L.Ed.2d 459 (1986) (concluding that when statute

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of *Bogan v. Scott- Harris*, 523 U.S. 44, 118 S. Ct. 966, 970, 140 L.Ed.2d 79 (1998) (local legislators and non-legislative officials performing legislative functions are entitled to immunity for their official acts).

was altered such that issues decided by court below were moot, the Court must set aside the lower court's decision).

[5, 6] D.H.L. attempts to bypass this precedent through reliance on an exception to the mootness doctrine for situations in which the defendant voluntarily ceases the challenged practice. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982) (holding that when an ordinance's revision became effective while the case was pending in the court of appeals, the Court retained jurisdiction over the question of the constitutionality of the prior ordinance). This exception applies, however, only when there is a reasonable expectation that the challenged conduct will be repeated following dismissal of the case. *See id.* at 289 & n.11, 102 S.Ct. 1070 (city had announced an intention to return to its original conduct after the litigation was concluded); *Northeastern Florida Chapter of the Associated General Contractors v. Jacksonville*, 508 U.S. 656, 662 & n.3, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (challenged statute had not been sufficiently altered to allow a conclusion that the conduct would not be repeated). In this case, the ordinance has been recast apparently for the purpose of making it more likely to overcome constitutional challenge and it has remained unchanged since 1996. With no indication of a contrary intent, it would be unreasonable to presume that the Town would return to its prior zoning plans after the conclusion of this litigation. Thus,

the voluntary-cessation exception to the mootness doctrine is inapplicable here.

[7] D.H.L. makes an additional argument that the issue is not moot, relying on a stipulation between the parties that if D.H.L. had been issued an adult entertainment license in 1994, the license would have been renewed automatically in subsequent years regardless of alterations to the zoning code. The critical flaw in D.H.L.'s analysis is that even if we were to hold that the 1994 zone had been unconstitutional, such a ruling does not necessarily lead to the conclusion that D.H.L. would have been granted a license in 1994. As D.H.L. appeared to acknowledge to the trial court, the Town would have retained the ability, after a finding of unconstitutionality, to review D.H.L.'s request and deny it for another, legitimate reason. An alternative scenario is that the Town might have created a constitutional adult entertainment zone before reviewing D.H.L.'s application for a license and could then lawfully have refused it the license.[2]

It is not for this court to speculate as to what might have happened had the Town's statute been struck down before it was superseded by the 1996 zoning ordinance now in effect. Thus, the

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[2] D.H.L. relies on two cases, both of which are distinguishable because the challenged ordinance remained in effect until the time of the court decision and was the basis for the court's grant of injunctive relief. *See Dia v. City of Toledo*, 937 F.Supp. 673, 679 (N.D.Ohio 1996); *Janra Enterprises, Inc. v. City of Reno*, 818 F.Supp. 1361, 1366 (D.Nev. 1993).

stipulation between D.H.L. and the Town, that *if* D.H.L. had received a license in 1994 it would have received a license every year thereafter, does not entitle D.H.L. to a license in the first instance.

III. *Constitutionality of the 1996 Zoning Ordinance*

[8] We thus turn to the constitutionality of Tyngsborough's 1996 zoning ordinance, currently in effect. In reviewing an appeal from an adverse ruling after a bench trial, we review the district court's legal determinations *de novo*, "according a significant amount of deference to the court's factual determinations and to most of its resolutions of mixed fact/law issues." *Globe Newspaper Co. v. Beacon Hill Architectural Comm'n*, 100 F.3d 175, 181 (1st Cir.1996). Tyngsborough's 1996 zoning ordinance defines "adult entertainment establishments" as including those providing live entertainment "which consists of entertainers engaging in 'Sexual Conduct' or 'Nudity.'" *See* Tyngsborough Zoning By-Laws § 2.11.46. The ordinance restricts the location of such businesses to the B-4 zone. *See id.* §§ 2.10.00, 2.11.00. It also authorizes the board of selectmen or the planning board to grant special use permits for adult entertainment establishments. *See id.* § 1.16.00.[3]

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[3] We note that testimony was given and the parties have stipulated to the fact that the zoning ordinance requires that adult entertainment businesses wishing to operate in the B-4 zone obtain a special permit from the board of selectmen and undergo a site review. *See* Tyngsborough Zoning By-Laws § 2.11.30 Table of Permitted Uses. Such a method of zoning combined with licensing may constitute a

[9] Generally, "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Mount Ephraim*, 452 U.S. 61, 68, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). Nevertheless, a town's zoning power "must be exercised within constitutional limits." *Moore v. East Cleveland*, 431 U.S. 494, 514, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (Stevens, J., concurring). As we have articulated: "Freedom of speech is among the most precious of our constitutional rights. Thus, courts have long recognized that, when governmental action places speech in special jeopardy, special protections

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prior restraint on speech, generally subjected to a substantially stricter review for constitutionality than a time, place, and manner restriction. *See, e.g., FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225, 110 S.Ct. 596, 107 L.Ed.2d 603 (199) (evaluating licensing scheme for sexually oriented businesses as prior restraint); *11126 Baltimore Boulevard, Inc. v. Prince George's County, Maryland*, 58 F.3d 988, 995 (4th Cir.1995) ("Following the decision in *Renton*, the Court has made clear that otherwise valid content-neutral time, place, and manner restrictions that require governmental permission prior to engaging in protected speech must be analyzed as prior restraints and are unconstitutional if they do not limit the discretion of the decision maker and provide for . . . procedural safeguards." (citing *FW/PBS*, 493 U.S. at 227-28, 110 S.Ct. 596) (footnote omitted)). Because D.H.L.'s permit was denied solely on the basis that it was not located in the B-4 zone, and D.H.L. does not seek review of the ordinance as a prior restraint on its speech, we evaluate the statute as a time, place, and manner restriction. We caution, however, that if the permitting process were not to incorporate adequate safeguards, it would not pass muster as a constitutional prior restraint.

must apply." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (lst Cir.1995).

A. *Appropriate Level of Scrutiny*

[10] We begin our analysis by noting that the activity which is being restricted, nude dancing, is presumably constitutionally protected speech. The Supreme Court has described nude dancing as "expressive conduct within the outer parameters of the First Amendment, though . . . only marginally so." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (plurality opinion).

[11-13] We next determine what level of scrutiny we should apply to the restriction on this constitutionally protected activity, which correlates directly to whether the ordinance is content-based or content-neutral. An ordinance is not content-neutral if the government has adopted it "'because of disagreement with the message it conveys.'" *National Amusements*, 43 F.3d at 737 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Further, a "regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Ward*, 491 U.S. at 791, 109 S.Ct. 2746; *see also Tollis Inc. v. San Bernadino County*, 827 F.2d 1329, 1332 (9th Cir.1987) ("[The content-neutral] requirement is met if the involved ordinance is 'aimed to control secondary effects resulting from

the protected expression' rather than at inhibiting the protected expression itself." (quoting *International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986))).

In *National Amusements*, an ordinance that prohibited the showing of motion pictures between 1:00 a.m. and 6:00 a.m. was deemed to be content-neutral because it did not reference the substance of the speech it regulated and did not appear to have arisen as a means of suppressing a particular message. *See National Amusements*, 43 F.3d at 737-39. The Court in *Renton* grappled with an ordinance that prohibited adult motion picture theaters from being located within 1000 feet of any residential zone, family dwelling, church, park, or school, and concluded that the ordinance, although it treated theaters that specialized in adult films differently from other theaters, was content-neutral because it was aimed not at the content of the films but rather at the secondary effects of such theaters on the surrounding community. *See Renton*, 475 U.S. at 47-49, 106 S.Ct. 925 (concluding that "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standard applicable to 'content-neutral' time, place, and manner restrictions" (footnotes omitted)).

[14] Thus, it is clear that an ordinance such as Tyngsborough's, if aimed at combatting the sec-

ondary effects of nude dancing rather than the content of the message expressed by nude dancing, is content-neutral. In determining whether the Tyngsborough ordinance is aimed at secondary effects, we note that a town is "entitled to rely on the experiences" of surrounding cities and towns: "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52, 106 S.Ct. 925 (holding that ordinance was validly designed to serve the substantial government interest of preserving the quality of urban life). Moreover, the Supreme Court has noted that a municipality's interest in protecting and preserving quality of life "must be accorded high respect." *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976) (plurality opinion); *see also Barnes*, 501 U.S. at 583, 111 S.Ct. 2456 (Souter, J., concurring) (stating that the interest of government in "preventing prostitution, sexual assault, and other criminal activity" is "plainly a substantial one").

D.H.L. challenges Tyngsborough's assurance that the ordinance was enacted to combat secondary effects and alleges that it did not rely on any "studies" of secondary effects. The district court, however, found that the record showed a "reasoned basis for evaluation of potential secondary effects as sufficiently likely to occur and to involve

significant consequences for community welfare to justify the challenged zoning ordinance," even though such evidence did not appear explicitly in town meeting minutes. Specifically, the court credited the testimony of John O'Gorman, chairman of the board of selectmen, regarding his instruction to the town administrator and the special town counsel, prior to the enactment of the 1994 zoning ordinance, to gather information about how other localities addressed adult entertainment and secondary effects issues. O'Gorman testified:

> I as the chairman of the Board of Selectmen instructed the town administrator along with special counsel to research all that they could with regard to adult entertainment, how it could be controlled, how it could be zoned, what other communities were doing, what other jurisdictions were doing with regard to adult entertainment. . . . [We did this to] learn as much as we could about adult entertainment and how it could be controlled, how it could be zoned within our community.

O'Gorman also testified that at the time of the 1994 zoning changes, the Town was aware that the two clubs in town that allegedly offered adult entertainment generated more police calls than other clubs. He stated that the public reaction to a proliferation of unlicensed adult entertainment was "tremendous" and many residents expressed great concern.

The district court also noted that a document, prepared for the 1994 special town meeting, evidenced public discussion prior to the ordinance's enactment[4] and that testimony substantiated the Town's claim that it relied on its impression, supported to at least some extent, that adult entertainment establishments placed greater demands on police because more calls were generated from those establishments. *See National Amusements*, 43 F.3d at 742 (noting that legislatures may rely on evidence of past problems with a particular activity and need not conduct an investigation to

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[4] The document stated in part:

The issue of adult entertainment, as I have stated before, is extremely emotional and complex, one which requires a great deal of thoughtful, objective consideration. Our office has been grappling with this issue for only three (3) short weeks. During this period we have had to identify and understand the rights of the community, the rights afforded to operators of adult entertainment establishments and the avenues available to the community for regulating and controlling adult entertainment establishments. Additionally we have been attempting to provide proper assistance and guidance to the citizen[s] of Tyngsborough who have sought answers to very tough questions. The [Town's] Executive Administrator has devoted nearly all of his time over the past (2) weeks in pulling together information from other communities on adult entertainment. We have come to find out through this research that there is no quick or uniform solution to the issues before us.

. . . . By law, we must be impartial and objective. . . . . We will, we *must*, rely heavily on [advice] of our hired counsel on these legal matters. Let me say again, though, that we clearly understand your feelings on these matters. Together, as a community, [let's] work within the legal system to resolve these difficult issues.

corroborate each incident). At the special town meeting, an open forum was held to educate the public on methods of zoning adult entertainment businesses and to allow citizens to express their concerns about the secondary effects of these businesses. We therefore conclude that the district court did not err in finding that ordinance was designed to combat secondary effects and is content-neutral. We also note that although secondary effects were more pointedly considered by the Town when enacting its 1994 zoning ordinance, the discussions that took place at that time can certainly be considered to pertain to the justifications of the 1996 modification of the zone.

B. *The Application of the Renton Test*

[15] Because the ordinance does not create an outright ban on adult entertainment and was enacted to address the secondary effects of adult entertainment rather than its content, it is a time, place, and manner restriction. *See, e.g., Tollis*, 827 F.2d at 1332 ("Like the ordinance involved in *Renton*, the ordinance before us is obviously a time, place, and manner regulation, as it does not ban adult theaters altogether."). As the Supreme Court explained in *Renton*, the intermediate scrutiny test for determining the constitutionality of a content-neutral time, place, and manner zoning restriction on adult entertainment is whether the ordinance is narrowly tailored "to serve a substantial government interest and allows for reasonable alternative avenues of communication." *See Renton*, 475 U.S. at 50, 106 S.Ct. 925 (citing

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984)).

1. *Narrowly Tailored to Serve a Substantial Government Interest*

[16] We have already determined that Tyngsborough considered secondary effects when it created the B-4 zone. We have also explained that a municipality's concern about secondary effects is a substantial government interest. Finally, to determine whether the ordinance fully satisfies the first prong of the *Renton* test, we must determine whether Tyngsborough's ordinance is sufficiently narrowly tailored to meet its interest.

[17] A content-neutral time, place, and manner restriction is narrowly tailored if it "'promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799, 109 S.Ct. 2746 (quoting *United States v. Albertini*, 472 U.S. 675, 689, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985)). In *Renton*, the Court held that the ordinance was narrowly tailored because it "affect[ed] only that category of theaters shown to produce the unwanted secondary effects." *Renton*, 475 U.S. at 52, 106 S.Ct. 925. In the instant case, Tyngsborough's ordinance, which applies directly to adult entertainment providers, does not reach other forms of entertainment. Further, Tyngsborough's use of a zoning mechanism to restrict such an activity confines the impact of the restriction to govern-

ance of the location of such activity and does not impact other aspects of the activity. Thus, the ordinance is sufficiently narrowly tailored to address the Town's substantial interest in combatting the secondary effects of adult entertainment.

2. *Reasonable Alternative Avenues of Communication*

Moving to the second prong of the *Renton* test, we evaluate whether Tyngsborough's ordinance allows reasonable alternative methods of communication. The essence of this question is not "whether a degree of curtailment" of speech exists, but rather "whether the remaining communicative avenues are adequate." *National Amusements*, 43 F.3d at 745 (holding that the limitations created by an ordinance were not unconstitutional because the challenger's evidence "does not call into legitimate question the adequacy of the alternate route of communication"). D.H.L. alleges that the Tyngsborough ordinance does not provide it with a reasonable opportunity to open and operate, relying heavily on the fact that only .09867% of the land within the town's borders has been designated as the B-4 zone. D.H.L. contends that even if the owner of the B-4 lots were willing to sell the land to an adult entertainment establishment, which D.H.L. contends the owner is not willing to do, such a small percentage of land does not constitute a reasonable opportunity.

D.H.L. misses the mark, however, in emphasizing this single factor. As the district court recognized, determining whether Tyngsborough's ordinance provides a reasonable opportunity for adult business to open and operate requires an evaluation of multiple factors. *See, e.g., 3570 East Foothill Blvd., Inc. v. City of Pasadena*, 912 F. Supp. 1257, 1265 (C.D.Cal.1995) ("[C]ourts have looked to a variety of relevant factors, including the percentage of land theoretically available to adult businesses, the number of sites potentially available in relation to the population of the city, the number of sites compared with the existing number of adult businesses, or the number of businesses desiring to offer adult entertainment."). Thus, the fact that Tyngsborough allocated only 10.4 acres of its 10,540 acres to the B-4 zone is relevant but not dispositive. As the Court of Appeals for the Fifth Circuit has held, "[t]here is no requirement in *Renton* . . . or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of sites be available." *Lakeland Lounge v. City of Jackson, Mississippi*, 973 F.2d 1255, 1260 (5th Cir.1992); *see also North Ave. Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir.1996) (stating that "acreage, standing alone, is largely irrelevant").

Because there is no single dispositive evaluative consideration, an analysis should encompass a variety of factors, including the percentage of acreage within the zone compared to the acreage available to commercial enterprises in general. As

the district court noted, "Tyngsborough is a rural town in which the total acreage in the only commercial district that could properly be identified as the principal business district occupies very little of Tyngsborough's total acreage."

The number of sites available to adult entertainment businesses is also relevant. *See International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157, 1165 (11th Cir.1991). Reasonable alternative avenues for communication have been found to exist when six adult businesses were operating in a town and more than six sites existed in the zoned area. *See Lakeland Lounge*, 973 F.2d at 1260 ("As a matter of arithmetic, . . . there are more 'reasonable' sites available than businesses with demands for them . . . .").

In this case, the district court held that all of the five lots in the B-4 zone were potentially available, crediting the testimony of Walter Eriksen, owner of the land within the B-4 zone, that although he had delayed placing the lots on the market in hopes that they would increase in value, they were now available to any purchaser for the right price.[5] Despite D.H.L.'s protestations

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[5] We note that we have viewed Eriksen's expression of distaste for adult entertainment establishments at the 1994 town meeting. We disagree with D.H.L., however, that this makes the lots unavailable to it. There is no indication in the record that Eriksen will attempt to unilaterally repeal the ordinance by refusing to sell to adult entertainment establishments, especially in light of the funds that he has committed to the development of the commercial park and his willingness to sell to any purchaser for the right price.

that the cost of development would be too high, *Renton* instructs that D.H.L.'s protection extends only so far as to put adult entertainment providers on an equal footing with other purchasers and does not require that they be able to obtain sites "at bargain prices." *See Renton*, 475 U.S. at 54, 106 S.Ct. 925 ("That respondents must fend for themselves in a real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation.").[6]

Because we agree that all of the lots in the B-4 zone are potentially available and other relevant factors do not negate the significance of this availability, we hold that Tyngsborough ordinance provides the constitutionally mandated "reasonable opportunity to open and operate." We note that one other establishment, the "Blue Moon," has lawfully offered adult entertainment in Tyngsborough since before the enactment of the 1987 zoning ordinance and thus has a right to continue operating despite the fact that it is not located in the B-4 zone. Although the Blue Moon operates on a grandfather permit, even if it were to be required to move into the B-4 zone, which it is not, that would leave five sites for two businesses.

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[6] D.H.L. contends that the fact that restrictive covenants that would have prohibited adult entertainment were considered by the landowner also indicates that the zoned lots are not available. As the district court noted, the restrictive covenants were not imposed, and if they had been, the case would be entirely different.

Moreover, each of the five lots, as stipulated by the parties, is suitable for development and has gas, water, and electrical lines available. The sites are accessible to the public as they are located in a commercial park with newly developed roadways. Although the parties have not supplied us with data about the number of businesses that would like to offer adult entertainment, we have not been shown that any business except D.H.L. has been denied an adult entertainment permit since the enactment of the 1996 zone. For these reasons, we hold that Tyngsborough's ordinance provides D.H.L., and other businesses wishing to offer adult entertainment, with a reasonable alternative avenue for communicating their constitutionally protected speech.

IV. *Certification*

On a final note, we address very briefly D.H.L.'s argument that the district court erred by declining to certify state law questions to state court prior to determining the federal constitutional issues. Because we are not convinced that state law provides an independent and sufficient basis for deciding the case, we conclude that the district court did not err by remanding the case to state court for determination of D.H.L.'s remaining state law claims after its adjudication of the federal issues.

In conclusion, because we hold that the constitutionality of the 1987 and 1994 Tyngsborough zoning ordinances is moot and the existing ordi-

nance is constitutional, the judgment of the district court is affirmed.

APPENDIX B

D.H.L. ASSOCIATES, INC., Plaintiff,

v.

John O'GORMAN, Robert Wallace, Warren Allgrove, Jr., and Eileen Farrell, Individually and in their Capacity as the Tyngsborough Board of Selectmen, and as the Licensing Board for the Town of Tyngsborough, and the Town of Tyngsborough, Defendants.

No. CIV. A. 94-12328-REK.

United States District Court,
D. Massachusetts.

May 7, 1998.

Restaurant owner challenged municipal ordinance regulating adult entertainment, seeking declaratory relief on federal and state constitutional grounds. Defendants, the town and town officials, removed case to federal court. The District Court, Keeton, J., held that: (1) secondary effects were properly considered when enacting ordinance; (2) ordinance provided reasonable opportunity to open and operate protected adult entertainment, and, therefore, did not violate Federal Constitution; (3) declaratory judgment was not warranted; and (4) district court would not

exercise supplemental jurisdiction over state law claims.

So ordered.

Thomas Lesser, William Newman, Lesser, Newman, Souweine & Nasser, Northampton, MA, for D.H.L. Associates, Inc., Plaintiffs.

Joyce F. Frank, Jonathon M. Silverstein, Richard P. Bowen, Kopelman and Paige, P.C., Boston, MA, for John O'Gorman, Robert Wallace, Warren Allgrove, Eileen Farrell, Tyngsborough, the City of, Tyngsborough Board of Selectmen, Licensing Board for the Town of Selectmen, Defendants.

Opinion

KEETON, District Judge.

A key characteristic of this case is that it involves interests of parties to the case that applicable law recognizes as interests deserving special protection.

Plaintiffs invoke the law's special protections for interests in freedom of expression and association, for which the applicable legal protections exist not only in the First Amendment of the Constitution and laws of the United States but also in state law that in some instances provides protections beyond those arising under the First Amendment, federal statutes, and federal-law precedents. Defendants invoke the law's special

protections for interests of a local community and its citizens in (among other things identified in later Parts of this Opinion) community and citizen choices about how, when, and in what circumstances and ways children receive education about human sexuality, sexual orientation, and explicitly sexual practices in places that are open to the public.

This opinion begins with a statement of background facts, mostly undisputed, in Part I. Part II identifies commercial and economic interests and issues arising from various ways in which they may be relevant to the federal-law claims in this case. Part III begins with a brief statement of conclusions of law that I have reached with respect to authoritative guidelines for decision in a case such as this. Immediately following that brief statement of conclusions is an explanation of the analysis and reasoning that have led me to conclusions about the appropriate legal tests to be applied.

Part IV concerns plaintiffs claim for declaratory judgment and issues of federalism that bear upon allocating authority among federal courts, on the one hand, and state and local institutions and agencies, on the other hand. These issues may have to be considered if plaintiffs do not show a preemptive entitlement to the relief they claim under the Constitution and laws of the United States.

The remaining Parts of the Opinion treat other issues that must be resolved to reach an outcome in this case, and other issues that might be decisive should a higher court take a different view of one or more of the matters I have thought decisive.

I. Background

The Town of Tyngsborough is located 40 miles from Boston on the border of New Hampshire. Tyngsborough's population is approximately 9,500 people. The Board of Selectmen sets town policy, and also acts as the town licensing authority with respect to alcoholic beverage ("pouring") and entertainment licenses.

In 1987, the Town of Tyngsborough, by Town Meeting, adopted a B-4 zone that the zoning ordinance declared would allow adult entertainment. The official zoning map (plaintiffs Exhibit No. 2) in effect at that time, however, and in effect until 1994, did not contain any parcel zoned B-4. As John O'Gorman, Chairman of the Board of Selectmen, testified, the 1987 B-4 zone was a "phantom zone."

In July, 1992, DHL Associates, Inc. applied for and the Board of Selectmen issued alcoholic beverage and live entertainment licences for the restaurant then-called "Bogie's" located at 350 Middlesex Road in Tyngsborough. In late January, 1994, DHL advertised the fact that it would be presenting nude dancing beginning on February

10, 1994, at the 350 Middlesex Road location. On February 24, 1994, the Town of Tyngsborough notified DHL that offering nude dancing was in violation of its entertainment licence. As a result, the Town suspended DHL's alcoholic beverage license for a two-day period. Although DHL has continued to offer nude dancing entertainment, the Town has not taken any further action against DHL, according to the testimony of John O'Gorman, because of this pending litigation.

DHL was not the only establishment that began offering live nude dancing entertainment in Tyngsborough in February, 1994. The advertisement of the prospective nude dancing entertainment caused concerned citizens to call their Selectmen. In response, the Selectmen asked the Town Administrator to research the issue of adult entertainment, and the Board held an open Town Meeting on February 14, 1994, to discuss adult entertainment in Tyngsborough. Seventy-five citizens attended the February 14, 1994 open Town Meeting.

Also at the February 14, 1994 Town Meeting, the Selectmen were presented with a Petition for a Special Town Meeting (plaintiff's Exhibit No. 28) to consider adopting Mass. Gen. L. ch. 138, § 12B prohibiting establishments that hold alcoholic beverage licenses from offering any form of nude entertainment. The Petition contained the signatures of over 650 registered Tyngsborough voters. So long as a Petition contains more than 200

such signatures, the Selectmen are obligated to hold a Special Town Meeting.

Once the Town Administrator verified that the required number of qualified signatures appeared on the petition, Articles and a Warrant for.a Town Meeting were prepared. In this instance, at a regularly scheduled meeting of the Board of Selectmen on March 7, 1994, the Selectmen signed the Warrant. At that same March 7, 1994 meeting, DHL applied to amend its entertainment license in order to offer nude dancing entertainment at the 350 Middlesex Road location then (and now) called "Matthew's," though some of its patrons still called it "Bogie's." The Board of Selectmen delayed acting on the license application.

On March 28, 1994, the Board of Selectmen, acting as the licensing authority, held a hearing on DHL's application to amend its license. The Selectmen delayed decision rather than voting on the application that night.

The next evening, March 29, 1994, the Special Town Meeting was conducted, at which four Articles relating to adult entertainment were presented to the voters. One of those Articles concerned re-zoning nine parcels, comprising 27 acres, as the B-4 zone to allow for adult entertainment. Voter opposition to the nine parcel proposal was apparent. Walter Eriksen, a private citizen and real estate developer, proposed rezoning the closed town landfill as the B-4 zone. John O'Gorman moved to amend the Article so that

only two parcels, a 4.41 and a 3.47 acre tract, would be placed in the B-4 zone. The Town Meeting unanimously adopted the amended Article and the other three Articles in their original form.

Although the tracts re-zoned B-4 were located in an industrial zone, the tracts were in close proximity to residences and to the Notre Dame School. The 4.41 acre lot, at the time of the re-zoning, and today, is occupied by a commercial self-storage business called Dover Storage.

After the Special Town Meeting and after a second hearing on DHL's application to amend its entertainment license, the Selectmen denied DHL's application, and the reason given, albeit belatedly, was that DHL was not located in the B-4 zone. In December of each year since, the Board of Selectmen have granted DHL an entertainment license that does not allow nude dancing.

On May 21, 1996, the Town of Tyngsborough, by a Town Meeting, eliminated the 1994 B-4 zone and established a new, B-4 zone on Cummings Road. The 1996 B-4 zone was located on property owned or then under contract for sale to Applewood Construction, which in turn is owned, by Walter Eriksen. Applewood Construction is developing an industrial park that will include five lots zoned B-4.

In 1994, seeking relief in a judicial forum, DHL Associates, Inc. filed a case in Middlesex Superior

Court. The original complaint sought declaratory relief on federal and state constitutional grounds, as well as damages against the Board of Selectmen. The defendants in the case removed the case to this court (Docket No. 1, filed November 22, 1994). As a result of the decision in *Bogan v. Scott-Harris,* ___ U.S. ___, 118 S.Ct. 966, ___ L.Ed.2d____ (1998), plaintiff's claims, with respect to the legislative activities of the Board of Selectmen became unsupportable. Plaintiff's remaining claims, founded on constitutional grounds, were tried before this court in a non-jury trial on April 29, 1998 through May 1, 1998.

II. Commercial and Economic Interests and Their Relevance

The plaintiff is a for-profit corporation that has operated a restaurant at 350 Middlesex Road in Tyngsborough under one name or another from about 1992 to the present. Through most of the years it has had a "pouring" license and an entertainment license. DHL's permits do not authorize adult entertainment at 350 Middlesex Road, but in fact the Town has not attempted to stop DHL's offering adult entertainment at that site in disregard of licensing and zoning requirements. In addition, other entities in Tyngsborough are providing adult entertainment, either with formal authorization or in violation of the licencing terms that the Town has not attempted to enforce while this case has been pending.

Because of plaintiff's commercial interest, if a distinction between commercial and noncommercial expression made a difference in outcome, this case should be treated as one involving a mix of municipal impediments to commercial speech, on one hand, and restraints on the interests of plaintiff and others in non-commercial expression and freedom of association, on the other hand.

Ordinarily a need exists for invoking the distinction between commercial and non-commercial expression only if the claims at issue would merit relief under the legal tests applicable to non-commercial expression. If claims would not merit relief under those legal tests, a determination that in some respects the claims were for protection of commercial rather than non-commercial forms of expression and association would weaken rather than strengthen the arguments for relief. In the circumstances of this case, however, commercial aspects may be significant in ways other than their bearing on protection for commercial speech. Comparisons among total economic consequences flowing from alternative proposals for accommodating clashing specially-valued, interests, as well as comparisons between economic impacts on the plaintiff and economic impacts on the community, may be factors to be considered in applying a totality-of-the-circumstances legal test (or a multifactor test short of a totality-of-the-circumstances test) for determining whether a federal-law claim for injunction or declaratory relief is meritorious.

III. Authoritative Guidelines for Decision

A. Summary of Conclusions About Guidelines

When specially-valued interests are present on only one side of a case in court, the law ordinarily treats an asserted need for protection of those specially-valued interests, if supported by proof, as outweighing opposing interests that the law does not recognize as specially-valued. If, however, an asserted need for protection of opposing specially-valued interests is also supported by proof, then neither set of interests can be treated as entirely outweighing the other except by making a decision that disregards or denies protection for some interests that the law ordinarily recognizes as specially-valued.

[1] After full consideration of all the sources of authoritative guidance for decision of which this court is aware, including all the state and federal constitutional, statutory, and decisional sources cited by the parties in their submissions to the court in this case, I conclude that in a case in which evidence supports assertions of specially-valued interests on both of the opposing sides, a court must aim for a resolution of the controversy that accommodates the clashing interests in an equitable and just way, if it is feasible to do so, rather than holding that one set of interests is more highly valued than the other and requires that the other set be sacrificed under a legally-

imposed bright-line rule of priority among specially-valued interests.

[2] A method of decision compatible with this aim is a two-part, factors-weighing method under which the court (1) considers, as a question to be answered, whether each among plausible alternative outcomes is a fair and appropriate resolution within the limits defined by law, and (2) considers, as factors to be weighed and evaluated, bearing upon the answer to that question, each assertion about one or the other of the clashing sets of interests that is supported by evidence and might plausibly be asserted to weigh significantly more favorably to the set of specially-valued interests on one side than to the set of specially-valued interests on the other side.

B. The *Renton* Standard and Application

I. Introduction

[3] Under *Renton v. Playtime Theatres, Inc.*, when a court is considering a constitutional challenge to a municipal zoning ordinance regulating adult entertainment, the appropriate inquiry is "whether the . . . ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." 475 U.S, 41, 50, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986). This statement of the ultimate question to be answered is in its nature one that requires the deciding authority, whoever that may be (e.g., municipal or agency official, or jury or

judge, or some combination of these), to apply a standard of judgment rather than a set of bright-line rules. What are the "factors" to be considered in applying that standard? Is the standard a totality-of-the-circumstances test or something very close to it?

2. Secondary Effects

[4] The community concern about "secondary effects," as that concept applies in this case, is not concern about the dissemination of offensive expression itself, but rather concern about deterioration of an area within the town, as evaluated from a community perspective that takes into account adult businesses in the area, and the likelihood of an increase in crime and other negative effects associated with the deterioration. *See Young v. American Mini Theatres,* 427 U.S. 50, 71, n. 34, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976). The town of Renton enacted the challenged zoning ordinance to prevent the secondary effects caused by adult theaters. *Renton,* 475 U.S. at 43, 106 S.Ct. 925. The Court of Appeals for the Ninth Circuit found the Renton ordinance unconstitutional because Renton had enacted the ordinance without the benefit of studies of secondary effects relating to the town of Renton itself. Instead, the town had relied on studies produced by and for the city of Seattle. *See id.* The Supreme Court held that Renton could rely on studies of other cities, noting that reliance on studies of other cities is permissible "so long as whatever evidence the city relies upon is reasonably believed to be

relevant to the problem that city addresses." *Id.* at 51-52, 106 S.Ct. 925.

[5] Plaintiff DHL argues, persuasively, that as applied to the present case, *Renton* means that the legislative body of Tyngsborough must do more to justify their zoning ordinance than say "we are scared of secondary effects." The record must show some reasoned basis for evaluation of potential secondary effects as sufficiently likely to occur and to involve significant consequences for community welfare to justify the challenged zoning ordinance. In this case, however, plaintiff's contention fails at the next step because that contention, as framed by plaintiff in its argument, is that the showing of the reasoned evaluation must appear in the minutes of the Town Meeting or in a transcript or other record of the Town Meeting at which the challenged legislative action was taken.

[6] In this case, as a finder of fact, I find that the reasoned basis for the legislative decision was persuasively shown by the evidence at trial. I find credible and probative the testimony of John O'Gorman regarding his direction to Town Administrator and Special Town Counsel almost six weeks in advance of the legislative action, to gather as much information as could 'be obtained about how other cities and towns, large and small, were addressing issues regarding making some provision within the town for legally protected adult entertainment while also dealing effectively with secondary effects on Police and fire resources, public safety, and compliance with

building and licensing requirements. Also, Mr. O'Gorman's testimony was supplemented and corroborated by evidence received at trial regarding the Article prepared for Special Town Meeting upon which the Selectmen voted on March 29, 1994, evidence of the public discussion occurring in advance of the meeting, and a stipulation and testimony about the greater demands on police from calls to or near places of adult entertainment requiring police response, than from other areas of the community in general. In summary, the evidence in this case was distinctly contrary to plaintiff's argumentative characterization of being nothing more than citizens and legislative officials saying "we are scared of secondary effects."

3. Reasonable Opportunity to Open and Operate

[7] The reviewing authority (an agency or a court) must examine the legislative process to see if the legislative body properly considered secondary effects, and then must examine the ordinance to see if it provides reasonable opportunity to open and operate, protected adult entertainment. *See Renton,* 475 U.S. at 50, 106 S.Ct. 925. Although the 1987 and 1994 B-4 zones likely did not provide reasonable opportunity within identified zones, those ordinances have been superseded and their flaws and vulnerabilities are not the basis for injunctive or even declaratory relief with respect to the future. The 1996 zoning ordinance is the one in effect since its enactment. Thus, the constitutionality of the 1987 "phantom

zone" and constitutionality of the 1994 single-available-lot-zone are not within the scope of a live controversy now before the court about whether the 1996 ordinance meets the required standard.

[8] *Renton* requires only an inquiry into whether a site is potentially available as contrasted with "actually" available. *See Renton*, 475 U.S. at 53, 106 S.Ct. 925. The court must consider "whether relocation sites provided to a business may be considered part of an actual business real estate market," and then "after excluding those sites that may not properly be considered to be part of the relevant real estate market, [whether] there are an adequate number of potential relocation sites for already existing. businesses." *Topanga Press, Inc. v. Los Angeles*, 989 F.2d 1524, 1529 (9th Cir.1993), *cert. denied*, 511 U.S. 1030, 114 S.Ct. 1537, 128 L.Ed.2d 190, (1994). This is not to say that the Constitution requires communities to make some minimum percentage of land available for the operation of adult businesses. *See North Ave. Novelties, Inc. v. Chicago*, 88 F.3d 441, 445 (7th Cir.1996), *cert. denied*, ___ U.S. ___, 117 S.Ct. 684, 136 L.Ed.2d 609 (1997).

[9] The Court of Appeals for the Ninth Circuit set out a series of factors it considered in evaluating the reasonableness of the opportunity to relocate existing businesses in light of zoning changes:

(1) First, although *Renton* stresses that the First Amendment only requires a relocation site to be potentially available rather than actually available, the requirement of potentiality connotes genuine possibility . . . we need determine only that property is not "potentially" available when it is unreasonable to believe that it would ever become available to any commercial enterprise. (2) Second, . . . relocation sites which are within manufacturing or industrial zones that are reasonably accessible to the general public may also be part of the market. (3) Third, areas in manufacturing zones which have proper infrastructure may be included in the market. (4) Fourth, when a relocation site suits some generic commercial enterprise, although not every particular enterprise, it too may be said to be part of the real estate market . . . . (5) Fifth, and most obvious, those relocation sites which are commercially zoned are part of the market. *Topanga Press,* 989 F.2d at 1531. Tyngsborough's 10.4 acre B-4 zone qualifies under *Topanga Press* in that the five Applewood parcels are potentially available, are accessible to the public, have proper infrastructure (or at least the possibility of proper infrastructure), suit some generic commercial enterprise, and are zoned as part of the market.

Availability of these five parcels, however, is not the only touchstone. The decisionmaker must also decide whether or not the five parcels offer enough to be reasonable, especially in light of Mr. Eriksen's testimony that the sites have not yet been available for sale, and in light of his vocal

opposition to adult entertainment in Tyngsborough.

[10] Regardless of whether or not the private property owner's personal stance on the issue is relevant, the amount of land offered is without question relevant, although not alone dispositive. Many courts have considered the percentage of the community's total land that is available for adult entertainment in the analysis of what amount of land was reasonable. *See, e.g., Alexander v.* Minneapolis, 928 F.2d 278, 283 (8th Cir. 1991) (finding the 13.5% of commercially zoned land in the city to be adequate); *Walnut Properties, Inc. v. Whittier,* 861 F.2d 1102, 1109 (9th Cir.1988), *cert denied,* 490 U.S. 1006, 109 S.Ct. 1641, 104 L.Ed.2d 157 (1989) (finding only a fraction of the appropriately zoned 99.5 acres was potentially available in light of 1,000 foot distance restriction and that it could hardly be compared to the 520 acres upheld in *Renton*); *Tri.-State Video Corp. v. Stephentown,* 1998 WL 72331 at *8 (N.D.N.Y.1998) (finding 17% vacancy of 67% properly zoned land to be adequate); *Centerfold Club, Inc. v. St. Petersburg,* 969 F.Supp. 1288, 1303 (M.D.Fla.1997) (finding the availability of 6.3% of the city's acreage to be adequate); *3570 East Foothill Blvd., Inc. v. Pasadena,* 912 F.Supp. 1257,1265 (C.D.Cal.1995), *aff'd,* 99 F.3d 1147, (finding that where only one adult business existed, an ordinance that allowed for the opening of eleven more adult businesses provided reasonable opportunity); *Janra Enters. v. Reno,* 818 F.Supp. 1361, 1364 (D.Nev.1993) (finding three parcels

insufficient); *Schneider v. City of Ramsey*, 800 F.Supp. 815, 820 (D.Minn.1992), *aff'd*, 12 F.3d 140 (8th Cir.1993) (finding 2.5% of a rural community sufficient showing of reasonable opportunity); *International Eateries of Am., Inc. v. Broward County*, 726 F.Supp. 1556, 1567 (S.D.Fla.1987) (finding .03% of county land available to be inadequate).

Here, Tyngsborough has made 10.4 of its 10,540 acres (.09867%, or less than one-tenth of one percent of the land) in the town "available." This, however, is not the end of the inquiry to be made under the multi-factor test that this court (or some other decisionmaker) must apply to decide whether Tyngsborough has failed to provide a reasonable opportunity for adult entertainment businesses to open and operate. The question introduced in Part II of this opinion must be examined more closely. The comparison between the number of total acres of land in Tyngsborough and the acres declared to be "available" for adult entertainment businesses is only one factor of the applicable multi-factor legal test. Tyngsborough is a rural town in which the total acreage in the only commercial district that could properly be identified as the principal business district occupies very little of Tyngsborough's total acreage. This much is clear from the record, even though no party proffered evidence as to the precise acreage occupied by businesses in Tyngsborough. Most of the precedents cited by plaintiff involve regulation of adult entertainment establishments in urban cities. A mere acreage comparison may

be appropriate in a city in which most of the land area is developed, but in a rural community, where most of the land is undeveloped open space, a mere acreage comparison is not an adequate basis for determining the reasonableness of what the town has made available.

Regional availability may also be relevant where a single town is both rural and small. Again, however, the record in this trial does not include evidence that would enable the court to make findings of regional availability with precision.

[11] Plaintiff also argues that the five parcels zoned B-4 are not potentially or actually available because all five sites are owned by a single individual, who is on the record at Town Meetings vocally opposing any zoning to permit adult entertainment. Plaintiff also introduced evidence at trial of restrictive covenants (Plaintiff's Exhibit No. 20) that Applewood Construction considered, but did not implement, for the industrial park that includes the five B-4 parcels.

Precedents do not make it clear and certain that Mr. Eriksen's opposition to adult entertainment establishments bears upon the issue to be decided. At least one court has examined the effect of private ownership of the available land and determined that

> [r]estrictive covenants or leases between third parties rendering a site unavailable to an adult establishment does not render the site unavailable for First Amendment pur-

> poses. Municipal or local governments are under no obligation either to dictate that third parties make their land available to adult establishments or to consider whether such private restrictions in fact exist.

Centerfold Club, Inc. v. St. Petersburg, 969 F.Supp. 1288, 1303 (M.D Fla.1997). On the other hand, the Court of Appeals for the Fifth Circuit has suggested that land with "legal characteristics that exclude adult businesses may not be considered available for constitutional purposes." *See Woodall v. El Paso,* 959 F.2d 1305, 1306 (5th Cir.1992), *cert. denied,* 506 U.S. 908, 113 S.Ct. 304, 121 L.Ed.2d 227 (1992).

If restrictive covenants prohibiting adult businesses are placed on the property, that will create a legal characteristic that makes the sites unavailable. Likewise, if Applewood Construction were presented with a genuine offer to buy (at a price that could be determined to be reasonable under a "reasonable buyer-reasonable seller" standard), and Applewood Construction refused to sell to an adult entertainment establishment, then the plaintiff would have evidence of the unavailability of the five parcels. But, the evidence before the court now consists of Walter Eriksen's testimony that if presented with the right price, he (or Applewood Construction) would sell to an adult entertainment establishment. Sites zoned by Tyngsborough to allow adult entertainment must be available, but they need not be at "bar-

gain prices." *Renton*, 475 U.S. at 54, 106 S.Ct. 925.

DHL has operated an adult entertainment enterprise at 350 Middlesex Road since February, 1994 . It has not thus far been denied any reasonable opportunity to operate. And the Blue Moon has been in continuous operation for over twenty years offering adult entertainment in Tyngsborough. Thus, Tyngsborough residents are not being denied access to this form of protected expression nor are nonresidents being denied access to this form of protected expression in Tyngsborough. Even if Tyngsborough were to revoke DHL's entertainment license for violating its provisions, plaintiff has not shown that DHL would not have a reasonable opportunity to establish a venue on one of the Applewood sites.

Since DHL is not seeking money damages and has been operating, though without a permit, it has not been denied a reasonable opportunity to operate. Plaintiff has failed to show that these sites are too few in number for a community with the characteristics of Tyngsborough. Furthermore, plaintiff has not shown that the five sites are "not available" because of Mr. Eriksen's personal views on adult entertainment or his interests as a property owner in seeking the highest market value for his property. The 1987 phantom zone, and the 1994 zone too limited to comply with the requirements of *Renton*, do not change the fact that the 1996 zoning by-laws brought

Tyngsborough into compliance in terms of reasonable opportunity to open and operate.

C. A Perspective on Conduct of Parties Locked in Ongoing Dispute

In human relations, often one excess begets another. In law, never does one excess excuse another. Even in the law of defense of person against physical aggression, a privileged response must be measured to the need for protection and neither retaliatory nor vindictive. When parties choose to engage in this sort of contest, they also choose the rules of contest (either rules of civility, or rules of aggression). And a party who engages in a verbally slashing attack, supplemented by threats of noncompliance with licensing and zoning requirements, cannot reasonably expect capitulation and a velvet embrace by the opposing party. In the circumstances of suspension by Tyngsborough of enforcement of its licensing requirements, DHL has not attempted to prove that it has suffered damages. On the other hand, the actions by DHL in clear violation of its licenses do not excuse formal but phantom zoning, suitable on paper only and not in fact.

By the time of trial, if not long before, the parties to this case might have expected the court to view the case in this perspective. Though strident still, their contentions at trial were substantially less accusatory and aggressive toward each other than the record persuades me they had been through the years of development of this contro-

versy. Moreover, the Supreme Court's decision in *Scott-Harris*, ___ U.S. ___, 118 S.Ct. 966, ___ L.Ed.2d____ (1998), substantially narrowed the scope of the issues this court had scheduled for trial when legal issues about the scope of legislative immunity of municipal officials, finally resolved in *Scott-Harris*, were still disputable. If those disputable issues of law had been resolved favorably to the plaintiff, the court would have been required to make findings regarding facts genuinely in dispute with respect to plaintiffs claim for an award of damages against the municipality and its individual officers who participated in decisions of a legislative character.

Having withdrawn its claim for a monetary award in light of *Scott-Harris*, plaintiff's primary position at trial was that neither its claims for injunctive and declaratory relief nor any of the defenses to those claims presented state-of-mind issues. Yet plaintiff's counsel sought repeatedly to offer evidence bearing on state-of-mind issues such as motive of various town officials, at the time of taking action under color of law, and scope of their knowledge at those times defendants previously acted and declared their plans for the future.

[12] Without ruling on sufficiency of proffered evidence to present a genuine dispute of material fact, the court overruled objections to state-of-mind evidence proffered by each party if in the court's view, at the time of ruling, the proffered evidence was at least relevant and of sufficient

probative weight to be potentially material when considered together with other evidence received at trial. With the completion of the trial and with the entire record now before me, as finder of facts I find that on all claims I decide (which, as explained in Part V below, do not include state-law claims), the state-of-mind evidence received at trial was insufficient to persuade me by a preponderance of the evidence that any of the challenged actions of town officials under color of law were both non-legislative in character and accompanied by a motive to impede or interfere with legally protectable interests of plaintiff in freedom of expression and freedom of association. Thus, plaintiff's federal-law claims against the municipality and the individual defendants in this case fail because of the combined effect of applicability of legislative immunity as explained in *Scott-Harris* and lack of proof of any non-legislative act under color of law with a state-of-mind that would defeat qualified immunity.

IV. Declaratory Relief, Supplemental Jurisdiction over State-law Claims, and Federalism

[13] A United States district court may grant declaratory relief in a case of actual controversy within its jurisdiction. 28 U.S.C. § 2201. The Declaratory Judgment Act did not create a right for the litigant; rather, it added a remedy that a court may grant in the exercise of discretion. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 287-89, 115 S.Ct.

2137, 2143, 132 L.Ed.2d 214 (1995); *EMC Corp. v. Norand Corp.*, 89 F.3d 807 (Fed.Cir.1996).

[14] Even if I were to find that the net evaluation of all relevant factors weighed in favor of finding a federal constitutional violation, which I have not, I would conclude that this court should not exercise its discretionary authority to grant declaratory relief in this case for several reasons.

First. As explained in Part II of this Opinion, the evaluation of the total economic implications for the public and the parties to this litigation, and the economic effects incident to plaintiff's requested declaratory relief in comparison with economic effects incident to alternative ways of providing reasonable opportunity for adult entertainment businesses at or near the site plaintiff proposes (350 Middlesex Road) weigh against plaintiff's choice of remedy.

Second. The evidence before me shows that DHL has offered nude dancing entertainment since 1994 without interference from the Town of Tyngsborough. At least until now, DHL has suffered no economic loss as a result of the zoning ordinance. Thus, the plaintiff's request for relief is essentially, "intended to fortify the litigant against future regulation," and therefore not a case in which declaratory relief should be granted. *Public Serv. Comm. v. Wycoff Co.*, 344 U.S. 237, 247, 73 S.Ct. 236, 97 L.Ed. 291 (1952).

Third. Although I have not undertaken a constitutional case-or-controversy assessment, it is

not at all clear that plaintiff has met that requirement.

These characteristics of this case also support this court's decision not to exercise supplemental jurisdiction over plaintiff's state-law claims. Accordingly, a declaration of the rights of the parties with respect to federal-law claims would not resolve the entire conflict between the parties. Moreover, the legislature and the courts of the Commonwealth of Massachusetts have developed a body of state law regarding protected expression and local zoning law. *See, e.g., T & D Video v. City of Revere,* 423 Mass. 577, 670 N.E.2d 162, 166 (1996).

Fourth. Because plaintiff has not met its burden on its federal-law claims, the interests of comity and federalism weigh heavily in' favor of this court's declining to grant declaratory relief on predicted premises of future circumstances that may never arise in fact. The more appropriate course is to remand state-law claims to the state courts. This disposition of the case in this court will maintain fidelity to principles of federalism and foster respect for state-created accommodations of federal constitutional constraints and state interests. *See El Dia, Inc. v. Hernandez Colon,* 963 F.2d 488, 497 (1st Cir.1992).

Fifth. The decision to grant declaratory relief is supported also by the guiding principle explained by the Supreme Court of the United States in *Wilton v. Seven Falls Co.,* 515 U.S. 277, 286, 115

S.Ct. 2137, 132 L.Ed.2d 214.(1995). The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, is "an enabling Act" conferring "a discretion on the courts rather than an absolute night upon the litigant," and creating not a duty but "an opportunity" that ordinarily is to be exercised, and in appropriate exceptional circumstances a United States district court may in the exercise of discretion decline to grant declaratory relief. *Id.* (citations omitted). I find this case, with all its distinctive characteristics explained in this Opinion, to be a case in which the exercise of discretion counsels against an order of declaratory relief that would of necessity be tailored to uncertain predictions about relationships between plaintiff and defendants as they may develop in the future.

The state-law claims that remain unresolved include challenges to zoning ordinances and acts of municipal officials bearing upon the adoption and implementation of zoning.

[15, 16] I recognize that this court has discretionary supplemental jurisdiction, in appropriate circumstances, *see United Mine Workers v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), over state-law claims of the general type plaintiff asserts. This case, however, is in my judgment an apt one for declining to exercise supplemental jurisdiction.

> [T]he termination of the foundational federal claim does not divest the district court of power to exercise supplemental jurisdic-

> tion but rather, sets the stage for an exercise of the court's inferred discretion . . . . In deciding whether or not to retain jurisdiction on such an occasion, the trial court must take into account concerns of comity, judicial economy, convenience, fairness, and the like.

See Roche v. John Hancock Mutual Life Ins. Co., 81 F.3d 249, 256 (1st Cir.1996) (citations omitted).

V. Conclusion

As plaintiff can no longer recover monetary damages in light of *Scott-Harris,* its only remaining requests are associated with declaratory or injunctive relief. I have concluded that it is inappropriate, in this case, for this court to exercise its discretionary authority to grant declaratory relief on plaintiff's federal-law claims. I have concluded also that plaintiff's remaining state-law claims should be remanded to Middlesex Superior Court for adjudication. Thus, in the proceedings in this court the plaintiff has not prevailed and is not entitled to an award of attorneys fees.

Order

For the foregoing reasons it is hereby ORDERED:

The Clerk is directed to enter forthwith on a separate document a Final Judgment as follows:

On the stipulations of the parties, the uncontested proposed findings of fact, the rulings of the court made in pretrial proceedings and at trial, and on findings and conclusions explained in the Opinion of May 7,1998, it is ORDERED:

(1) Judgment in favor of defendants on plaintiff's federal constitutional claims;

(2) Plaintiff's remaining state-law claims are remanded to Middlesex Superior Court for further proceedings;

(3) All parties are to bear their own costs and attorneys fees.

APPENDIX C

RULES OF THE SUPREME JUDICIAL COURT

RULE 1:03 UNIFORM CERTIFICATION OF QUESTIONS OF LAW

Section 1. Authority to Answer Certain Questions of Law. This court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of this court.

Section 2. Method of Invoking. This rule may be invoked by an order of any of the courts referred to in Section 1 upon that court's own motion or upon the motion of any party to the cause.

Section 3. Contents of Certification Order. A certification order shall set forth

(1) the question of law to be answered; and

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose.

Section 4. Preparation of Certification Order. The certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to this court by the clerk of the certifying court under its official seal. This court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of this court, the record or portion thereof may be necessary in answering the questions.

Section 5. Costs of Certification. Fees and costs shall be the same as in civil appeals docketed before this court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

Section 6. Briefs and Arguments. Proceedings in this court shall be those provided in these rules, the Massachusetts Rules of Appellate Procedure or statutes governing briefs and arguments, so far as reasonably applicable.

Section 7. Opinion. The written opinion of this court stating the law governing the questions certified shall be sent by the clerk under the seal of this court to the certifying court and to the parties.

Section 8. Power to Certify. This court on its own motion or the motion of any party may order certification of questions of law to the highest court of any state when it appears to the certify-

ing court that there are involved in any proceeding before the court questions of law of the receiving state which may be determinative of the cause then pending in the certifying court and it appears to the certifying court that there are no controlling precedents in the decisions of the highest court or intermediate appellate courts of the receiving state.

Section 9. Procedure on Certifying. The procedures for certification from this state to the receiving state shall be those provided in the laws of the receiving state.

Section 10. Uniformity of Interpretation. This rule shall be so construed as to effectuate its general purpose to make uniform the law of those states which adopt it; or enact a uniform certification statute.

Section 11. Short Title. This rule may be cited as the Uniform Certificate of Questions of Law Rule.

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

D.H.L. ASSOCIATES, INC., Plaintiff v. JOHN O'GORMAN, ROBERT WALLACE, WARREN ALLGROVE, JR., and EILEEN FARRELL, INDIVIDUALLY AND IN THEIR CAPACITY AS THE TYNGSBOROUGH BOARD OF SELECTMEN, AND AS THE LICENSING BOARD FOR THE TOWN OF TYNGSBOROUGH, and THE TOWN OF TYNGSBOROUGH Defendants	C.A. NO. 94-12328 REK

PLAINTIFF'S MOTION TO REMAND THIS CASE TO STATE COURT

Now comes the plaintiff in the above-captioned matter and respectfully requests that this court remand this case to the Massachusetts Superior Court on the grounds that removal of this case was improper and not in accordance 28 U.S.C. 1441. Armistead v. C & M Transport, Inc., 49

F.3d (1st Cir. 1995); Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996).

In further support of this motion, the plaintiff refers the court to its Memorandum in Response to the Court's October 3, 1997 Rulings and Order submitted herewith.

Respectfully submitted,
The Plaintiff
By its attorney,

Dated: November 12, 1997

/s/_____
Thomas Lesser, BBO No. 295000
LESSER, NEWMAN, SOUWEINE & NASSER
39 Main Street, Northampton, MA 01060
413-584-7331

CERTIFICATE OF SERVICE

I, Thomas Lesser, hereby certify that on November 12, 1997, I served a copy of the foregoing document on the parties by first class mail to counsel of record: Richard P. Bowen, Esq., KOPELMAN & PAIGE, P.C., 31 St. James Avenue, Boston, MA 02116.

/s/_____
Thomas Lesser

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

D.H.L. ASSOCIATES, INC., Plaintiff v. JOHN O'GORMAN, ROBERT WALLACE, WARREN ALLGROVE, JR., and EILEEN FARRELL, INDIVIDUALLY AND IN THEIR CAPACITY AS THE TYNGSBOROUGH BOARD OF SELECTMEN, AND AS THE LICENSING BOARD FOR THE TOWN OF TYNGSBOROUGH, and THE TOWN OF TYNGSBOROUGH Defendants	C.A. NO. 94-12328 REK

PLAINTIFF'S MOTION REQUESTING THAT THE COURT INVOKE PULLMAN ATTENTION AND REMAND THE STATE LAW QUESTIONS TO STATE COURT OR ALTERNATIVELY TO CERTIFY THE STATE LAW QUESTIONS TO THE SUPREME JUDICIAL COURT

Now comes the plaintiff in the above-captioned matter and respectfully requests that this court

abstain from ruling on the plaintiff's federal claims pursuant to the doctrine first enunciated in Railroad Commission v. Pullman Co., 312 U.S. 496 (1941). Pustell v. Lynn Public Schools, 18 F.3d 50 (1st Cir. 1994).

Accordingly, the plaintiff further requests that this court remand back to Massachusetts Superior Court the plaintiff's unsettled state-law questions presented under the higher level of protection afforded expression by art. 16 of the Massachusetts Declaration of Rights. See Guiney v. Roache, 833 F.2d 1079 (1st Cir. 1987).

Alternatively, the plaintiff requests that the court certify the substantial, but arguably unsettled state law claims presented under art. 16 of the Massachusetts Declaration of Rights to the Supreme Judicial Court for decision to clarify the extent of state-created rights as applied to the controversy before the court. See Pyle v. South Hadley School Committee, 55 F.3d 20 (1st Cir. 1995).

In further support of this motion, the plaintiff refers the court to its Memorandum in Response

to the Court's October 3, 1997 Rulings and Order submitted herewith.

Respectfully submitted,
The Plaintiff
By its attorney,

Dated: November 12, 1997

/s/
Thomas Lesser, BBO No. 295000
LESSER, NEWMAN, SOUWEINE & NASSER
39 Main Street
Northampton, MA 01060
413-584-7331

CERTIFICATE OF SERVICE

I, Thomas Lesser, hereby certify that on November 12, 1997, I served a copy of the foregoing document on the parties by first class mail to counsel of record: Richard P. Bowen, Esq., KOPELMAN & PAIGE, P.C., 31 St. James Avenue, Boston, MA 02116.

/s/
Thomas Lesser

APPENDIX F

EXCERPTS FROM THE RECORD APPENDIX OF A COLLOQUY BETWEEN COUNSEL AND THE TRIAL COURT DURING A PRE-TRIAL HEARING ON DECEMBER 12, 1997

MR. LESSER: Correct.

THE COURT: And what you want is to be relieved of the hazard that what you're doing will sometime later be declared as a violation, is that it?

MR. LESSER: That's it. I mean, there are attorney's fees involved too, but other than that there is nothing else. We're asking for a license.

THE COURT: All right. What's your position?

MR. BOWEN: Thank you, your Honor. I'd just like to address two issues. The first issue I will address is probably the secondary issue, but I might as well do it this way.

Your Honor also would have the authority to remand the question of whether the license would issue back to the local licensing authority for further consideration under the statute, so I don't think we should pass over that as an option if the Town were to suffer an adverse judgment.

With that point being off the table now, your Honor, in terms of sending it back to the state

court, we've brief the issue and we respectfully ask the Court not to invoke the Pullman extension doctrine or, in the alternative, not to remand the matter to state court. The reason for that is as follows, your Honor.

The plaintiff has as the central contention for those two motion the T & D Video case, which -- we were discussing it before this hearing and I think the parties are in some agreement that that case is really central to where we are right now.

The plaintiff suggests that there is a special state law issue that must be addressed, should be addressed by the state court rather than by this Court, and it makes that argument based on the holding of the Supreme Judicial Court in T & D Video. As we stated in our brief, the T & D Video case is not a state constitutional case. It does not deal with Article 16. The only reference to Article 16 in the entire decision --

THE COURT: Now, I've read your submission on that. Now, here's the problem I have with that:

Even if you are right about the way that decision was written, there's nothing in the world to stop the SJC from saying, "Well, now that the Supreme Court of the United States has expressed their disagreement on federal law with the view we adopted, we now declare this is our ruling under state law, state constitutional provision."

There's nothing to stop them from saying that, right?

MR. BOWEN: I agree with you, your Honor, but they haven't done it.

THE COURT: All right. But, you see, if you agree that the SJC, even if they were thinking of it in terms of federal constitutional law, decided squarely against your contention, then I cannot take that as an indication that when it's brought to their attention that the Supreme Court of the United States has issued recent decisions that are contrary to their interpretation of federal law; therefore, they should change their ruling on the out come -- because I think it's much more likely that what they would do is say, "All right. We reach this decision under the state declaration of rights instead of the First Amendment" and so forth, First and Fourteenth.

And, you see, another thing that's troubling me about the various things each of you is trying to get me to do is, it sounds to me like a way of keeping this litigation going forever.

MR. BOWEN: We don't want that, your Honor. We'd like to have a trial.

THE COURT: And it seems to me it's much wiser, even though it means more work for me, for me to try the case and to try it as soon as possible, and the only question then is should we instead of trying it in the next couple of months

wait at least till we see what the Supreme Court says in Scott-Harris.

MR. BOWEN: Your Honor, I have no objection to awaiting the outcome of the Supreme Court.

THE COURT: Now, let me ask you this:

APPENDIX G

EXCERPTS FROM THE RECORD APPENDIX OF TESTIMONY, AND COLLOQUIES BETWEEN COUNSEL AND THE TRIAL COURT DURING THE SECOND DAY OF THE THREE DAY TRIAL, APRIL 30, 1998

[72] . . . a legal conclusion and this is a lay witness.

THE COURT: This is a question about his awareness, not a question of law. The objection is overruled.

A. One of the problems with these covenants is they did not allow a lot of use that would be allowed in that zoning district, so, yes, you are correct.

Q. At the present time it is my understanding that several parcels have been leased and there is one building that is going to be erected?

A. Yes, we have one building that is going to be erected.

Q. That is pursuant to a lease?

A. Yes.

Q. And, have you sold any other parcels?

A. No.

Q. So, the industrial parcel is owned by you?

A. That is correct.

Q. Now, with regard to the adult entertainment zone, those would be Lots 14, 15, 16, 17 and a part of 13, is that correct?

A. That is correct.

Q. Have any of those parcels been available for purchase to date?

A. No, they haven't been.

Q. Are any of those parcels available for purchase as of today?

[73] A. As of today?

Q. As of today?

A. They may be.

Q. When you say "they may be," if somebody walked in and wanted to purchase one of those parcels, is it your testimony that a person could do so?

MR. BOWEN: Objection, your Honor, it calls for speculation.

A. Yes.

Q. Is that your view or is that the view of the entire entity that owns those parcels?

A. That would be my view as well. I am a businessman. I am in the real estate development business. Under the right terms and conditions, anything would be for sale.

Q. With regard to these parcels, do you recall getting a call from an Attorney Munson with regard to purchasing these properties?

A. I do not know if I received a call from an attorney, but I have seen a number of phone calls regarding those parcels.

Q. Do you recall telling those people, at least one of those people, that you retain those parcels as part of your portfolio?

A. And, that they were not on the market at this time, yes, I believe that was probably last year.

[74] Q. If I told you -- suggested to you that it was in June of 1997, would that refresh your memory? That would be last year.

A. No, June of '98 – '97, that may be correct.

Q. With regard to the use of these parcels for adult entertainment, they are at the entrance to one of the roads to your park, correct?

A. Yes.

Q You have indicated you are a businessman who is interested in making as much money as possible from all the lots in the park?

A. That is correct.

Q. And, you have invested a large sum of money in this park?

A. That is correct.

Q. The land cost in excess of $600,000?

A. Yes.

Q. And, the road cost in excess of $700,000?

A. Yes.

Q. And, there's hundreds of dollars of over cost, is that fair?

A. Yes.

Q. And, there is, in fact, among certain people who might be interested in purchasing some of these lots a perception with regard to adult entertainment, as a businessman you . . .

[51] applicable law here.

MR. LESSER: Under Renton, Your Honor, the issue is the reasonable availability to open and operate. And, therefore, the question with

regard to the '94 zone becomes, given there's two parcels and one of them is a single use, special use property, we are down to one parcel in '94 because Dover Storage as a practical matter is not reasonably available.

THE COURT: All right. Now, that is an element of state law; right?

MR. NEWMAN: It's certainly an element of state law, Your Honor, yes.

THE COURT: All right. Are you contending that that is a part of the federal law applicable to this case? You are, after all, here arguing to me not a state law question but a federal constitutional claim that you're making; right?

MR. NEWMAN: We are making both, Your Honor, absolutely.

THE COURT: Well, but insofar as you're trying to make a state law claim, you have a lot of other hurdles. Insofar as you're trying to make a federal constitutional claim, I understand that I should take into account whatever evidence is bearing on that. But, you see, as I said to you before, this is a critically important question in this case **[52]** dealing with what is the role of this court. You're asking this court, this solo judge sitting here to decide fact questions in this case and to supersede, displace the judgment of state courts, state agencies, municipal agencies, everybody else who might be involved in the decision-

making process with respect to the rights of the parties in this case.

So I need to know whether this 1996 decision of the Supreme Judicial Court is somehow transformed into a part of the federal law that I am to apply to this case. If it is not, then I don't look to that case. I look to whatever federal law I have to guide me in deciding whether it's proper for me to be hearing this kind of evidence and deciding this kind of question myself.

Instead of saying -- the contention you're making is really not so much one that is governed by federal constitutional law but instead one that is governed by the federal precedent bearing on federalism which requires me and any other federal judge, including the higher courts that will review my decision, to be respectful of the roles of state decision makers in whatever kind of agency, tribunal, municipality, legislative council, whatever. And I'm having difficulty understanding how you asked me to get over that hurdle that as a federal trial judge I am not supposed to be deciding the thing you're trying to place before me now unless something in the federal constitutional law assigns me that **[53]** function rather than saying I should say no, I can't decide those questions. That's not properly within my authority. If you have some claim to make on the basis of those questions, go take it to the state agencies, whoever it is, that has authority here.

MR. NEWMAN: Your Honor, I -- I don't want to adopt the Court's blank check analogy. I'd like to point out two things very quickly if I might.

First, the issue, of course, is what the Town of Tyngsborough did. There are now other state agencies here. It's the adoption of these two zones we're talking about.

Secondly, we agree, Your Honor, that mostly this should be decided on state law grounds. And we filed the case in the state court. We thought it was appropriate for the state court. We think they are primarily state claims that come before it. It was the defendants who removed this case.

THE COURT: Now, wait a minute. You see, you are telling me now that it was only the town that did anything. Well, if the town, if it's the actions of the town that are under review here, not even the Superior Court where you filed this case would have authority to -- a superior court judge, justice sitting alone would not have the authority to supersede somebody else's decision making that's supposed to be done under the state law system.

So we've still got a problem that you're asking a **[54]** court to step in and have a single decision maker substitute for the political processes in the town, for the agency decision making in the town, for the hearings of boards and commissions and committees, and supersede all of that and have a single decision maker do it.

MR. NEWMAN: Your Honor, there is no administrative, state administrative review of what occurred. This comes before, would come before a justice of the superior court who would be asked or would have been asked to declare as unconstitutional and violative of state law the two zones that are at issue in this case or three zones that are the issue in this case and to enjoin the town to issue the license.

THE COURT: Now, you've referred to state law, state law standards. Now, if that is the circumstance, it seems to me that even at this late stage, perhaps the appropriate decision for me if I conclude you have a claim on that basis would be to remand this case to the superior court for that court's evaluation and determination of your claim as to whether you're right on your state law contention. That would make a lot more sense than my deciding it.

And then either after I have decided it, certify to the SJC did I get it right or else letting you appeal to the First Circuit and the First Circuit would then certify to the SJC very likely did the trial judge get it right that this is **[55]** a matter of state law.

MR. BOWEN: Your Honor, we have enjoyed our visit to the federal court. We would like to be here.

THE COURT: So you don't want me to remand it to the state superior court so all right. So the two of you come to me and say even if you don't have authority to decide this for us, we stipulate, we give you authority. You cannot do that. This is a court of limited jurisdiction. I can only decide the thing that the constitution of laws of the United States give my authority to decide. I can't decide something because everybody else would rather have it decided in this court than to have it decided where it's supposed to be decided.

The constitutional laws of the United States don't give me that authority to let you expand my jurisdiction.

MR. BOWEN: Your Honor, that's not what we seek to do. And my brothers have filed several, in fact, there is as recently as three weeks before trial before a final pretrial conference motions to remand to state court, certify to state court. And we are here, Your Honor. We have pendent Jurisdiction issues.

And maybe just as a last comment, the state constitutional law is co-extensive with the federal law.

THE COURT: Well, that's an assertion but, you know, I don't know your assertion is authoritative of **[56]** determining whether I have jurisdiction.

There are several circumstances in which it's very clear that the state Supreme Judicial

Court has decided that their protection of various kinds of freedom of individuals from governmental intrusion are more sweeping, broader than the Supreme Court of the United States says the federal constitution protections are. And so why should I not at least worry about whether this is not one of those situations.

All right. Now, I will not decide this issue at this moment. I will take it, along with everything else in the case, and will decide it after I have heard the rest of the evidence in the case and heard your arguments.

Now, that being so, you may complete your direct examination of this witness and then I'll allow the cross-examination to proceed.

DIRECT EXAMINATION, (Cont'd.)

BY MR. NEWMAN:

Q. Mr. Foster, Mr. Bowen asked you some questions about occupancy rate for the property, Dover Storage property. I'd like to show you the deposition to which you referred and ask you if that deposition gave information about occupancy rates in 1995 and 1996?

A. It does.

Q. Okay. And do you have that information available to you?

A. Yes.

[80] that some of these establishments were offering unlicensed adult entertainment?

A. I became aware of the fact that in February of 1994, is that what you stated?

Q. Yes.

A. -- that there were at least two establishments that I was directly aware of that were offering unlicensed, uncontrolled, unpermitted adult entertainment.

Q. And how did you learn of this?

A. In the instance of Matthew's D.H.L. Associates, I learned through a flyer that they were circulating through the community.

In the case of the other establishment which was known as Pub .30 Something, there was an ad placed in the local paper known as the Lowell Sun that they were to do it.

Q. As a public official -- strike that.

Was.there any public reaction?

A. There was tremendous public reaction.

Q. Can you describe the reaction that you're aware of?

A. I received numerous phone calls at my home from residents of the community as well as town hall. These residents were very concerned that uncontrolled, unlicensed establishments, existing establishments, were now offering adult entertainment. They were very concerned that by them offering adult entertainment, we, in fact, were perhaps opening **[81]** ourselves up to more crime, perhaps more drugs, prostitution, perhaps even going to the effect of maybe there being sexual crimes being committed within our community by having these establishments open up. And they were concerned that they were just opening up without regard to applying for permits.

MR. LESSER: Your Honor, I ask that it be struck on hearsay grounds.

MR. BOWEN: Your Honor, we're not offering for the truth of the matter, the state of the citizens --

THE COURT: Well, that is not entirely persuasive to me as a response. But there is another problem it seems to me that we are now talking about an official of the town receiving communications from constituents. And the official of the town is one of the policy makers of the town by legislation, legislative acts of the town's legislative body that sets policy.

Now, I don't know of any legal constraint that says that when I am trying a civil action that involves decisions that may be assessed as legis-

lative in character, that I should not permit testimony about communications that were made to the legislature that are permissible under law and might have an influence on the legislative decision appropriately.

Now if you have some law that tells me I should not receive this evidence, then I need to see that authority and I . . .

[92] marked as Exhibit 28. Do you recognize that document?

A. I do.

Q. And could you tell me what it is?

A. It's a petition for a special town meeting. It was signed by residents of the community requesting a -- for requesting a special town meeting be held.

Q. And on the face of the document there's a red stamp?

A. Yes.

Q. Can you tell me what that red stamp indicates?

A. It says received February 14, 1994 by the Town of Tyngsborough Board of Selectmen.

MR. BOWEN: Your Honor, at this point I would ask the Court to take judicial notice of General Laws Chapter 39, Section 10 concerning --

THE COURT: Well, the same point that I made to plaintiff's counsel earlier, I am not giving any special meaning to judicial notice. Of course I'll consider it.

MR. BOWEN: Thank you.

Q. Now, do you know how many signatures were on that petition?

A. I believe well, 652.

Q. And what was the purpose of the petition? As stated?

A. Excuse me?

Q. As stated in the document?

A. The petition for special town meeting which was put . . .

APPENDIX H

EXCERPTS FROM FACTS STIPULATED BY THE PARTIES FOR TRIAL

. . . no document or record indicating that the Town of Tyngsborough had considered any studies of the secondary effects of adult entertainment in Tyngsborough or elsewhere. (Plaintiff ¶79)

45. The proposed B-4 zone did not include 350 Middlesex Road, where DHL is located. (Plaintiff ¶55).

46. The Massachusetts Attorney General approved the B-4 By-law on July 5, 1994. (Defendants ¶47)

47. Plaintiff never applied for a permit to operate within the 1994 B-4 zone. (Defendants ¶48)

1996 Zoning By-Law

48. On May 21, 1996, Tyngsborough held a Town Meeting at which an Article was presented that would change the location of the B-4 zone. (Plaintiff ¶97)

49. At the May 21, 1996 meeting, Tyngsborough voted to eliminate the B-4 zone then in effect, which consisted of the 4.41 acre and 3.47 acre parcels, and voted to estab-

lish a new B-4 zone on Cummings Road, containing approximately 10.4 acres. (Plaintiff, ¶99)

50. Prior to the passage of the Article at the May 21, 1996 Town Meeting changing the location of the B-4 zone, the Tyngsborough Planning Board did not consider any studies with regard to secondary effects. (Plaintiff ¶100)

51. Prior to the passage of the Article at the May 21, 1996 Town Meeting changing the location of the B-4 zone, no document on file in the Tyngsborough Town Hall referred to any studies of the secondary effects of adult entertainment in Tyngsborough or elsewhere. (Plaintiff ¶104).

52. The land comprising the new B-4 zone is and was owned by Applewood Construction, Inc. (Defendants ¶54)

53. The 1996 B-4 zone is located off of Route 3, a major interstate highway. (Defendants ¶57)

54. The 1996 B-4 zone is accessible from a paved two lane road from Route 3. (Defendants ¶58)

55. The B-4 zone is located within an industrially zoned area known as Applewood Commercial Park. This area is commer-

cial/industrial in character. Only two prior non-conforming residential uses are located within the park. (Defendants ¶59)

56. Applewood Commercial Park is being developed for twenty-two multi-tenant, commercial buildings totaling 400,000 square feet in commercial space. (Defendants ¶60)

57. Building sites within Applewood Commercial Park, including those in the B-4 zone are available for purchase from Applewood Construction, Inc., subject to restrictions, if any. (Defendants ¶61)

58. Immediately adjacent to the current B-4 zone is a residence. (Plaintiff ¶111)

59. The current B-4 zone is located more than three miles from the police station; Mathew's is located approximately two miles from the police station. (Plaintiff ¶126)

60. This zoning change was subsequently approved by the Attorney General. (Defendants ¶55)

(2)

Supreme Court, U.S.
FILED
APR 1 2000
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No. 99-1536

IN THE

Supreme Court of the United States

D.H.L. ASSOCIATES, INC.,

Petitioner,

v.

JOHN O'GORMAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Court of Appeals properly declined to disturb the District Court's discretionary decision to deny plaintiff's request for certification.

   a. Whether the Court of Appeals properly determined that there exist no dispositive or unsettled questions of state law warranting certification.

   b. Whether the plaintiff's request for certification comprised an improper attempt to manipulate the federal courts' jurisdiction to insulate from review by the federal judiciary state court interpretations of federal constitutional provisions favorable to the plaintiff.

2. Whether the Court of Appeals appropriately applied the standard for review of adult entertainment zoning regulations set forth by this Court in *Renton v. Playtime Theatres, Inc.*, and whether such application was consistent with the holdings of other circuits.

   a. Whether the Court of Appeals properly affirmed the District Court's determination that the subject zoning By-law satisfied the "substantial government interest" test, in that it was designed to combat the adverse secondary effects commonly associated with adult entertainment.

   b. Whether the Court of Appeals properly affirmed the District Court's determination that the subject zoning By-law provides for a reasonable opportunity for adult entertainment establishments to open and operate.

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STATUTORY PROVISIONS INVOLVED

In addition to constitutional provisions and statutes referenced by the petitioner, this case involves statutes of the United States, 42 U.S.C. §§ 1983 and 1988(b), and the Commonwealth of Massachusetts, Mass. Gen. L. ch. 12, Sections 11H and 11I, the complete texts of which are set forth in the Appendix to this brief.

STATEMENT OF THE CASE

A. Procedural History

By this action, DHL seeks to invalidate a duly-promulgated zoning By-law enacted by the Town of Tyngsborough ("the Town") to regulate the time, place and manner of sexually-oriented business activities ("the By-law"). DHL further seeks to compel the issuance of a sexually-oriented entertainment license for an establishment owned and operated by DHL, known as "Mathew's."

The Complaint was originally filed in the Massachusetts Superior Court for Middlesex County, and the defendants removed the action to the United States District Court for the District of Massachusetts. In its zeal to paint this case as one primarily concerning questions of state law, DHL asserts that the Complaint "raised state statutory and constitutional violations, as well as a single count under 42 U.S.C. § 1983." (Petition for Writ of Certiorari [hereinafter "Petition"], p.2). What DHL neglects to mention is that, in addition to the count under 42 U.S.C. § 1983, the Complaint also contains three separate counts alleging violations of DHL's rights under the United States Constitution as well as the Massachusetts Declaration of Rights. (First Circuit Appendix [hereinafter

"A.__"], 20-22). Therefore, four of the eight counts in the Complaint state federal questions.[1]

Contrary to DHL's assertion that, "[a]fter removal, the petitioner filed motions to remand or certify the state constitutional issues to the state courts" (Petition, p.8), DHL actually waited over three years before filing any such motion. During this period the parties proceeded with the litigation of this case in the District Court, and DHL neither objected to the District Court's retention of jurisdiction, nor moved to have the case or any portion thereof remanded or certified to the state courts. Likewise, at no time during this period, did DHL attempt to characterize the protections invoked under the Massachusetts Declaration of Rights as separate from or broader in scope than the protections afforded under the First Amendment to the United States Constitution. Not coincidentally, when DHL did move for remand and certification on November 12, 1997, *over three years* after the initiation of this litigation, it did so only after the District Court had, on October 3, 1997, issued summary judgment rulings adverse to DHL. (*See* A. 7, 510-540). The District Court denied DHL's motions for remand and certification, as well as several subsequent motions for remand, certification and abstention.

After a three-day bench trial, the District Court found in favor of the Town and entered judgment dismissing all of DHL's

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1. DHL agreed prior to trial that one of the state law counts, the "Fourth Cause of Action," was precluded by the findings of the state Superior Court's decision in a related license suspension case. The first three counts all concerned state law licensing claims which must be deemed subsidiary to the constitutionality of the By-law, in that DHL could not legally exercise any license in derogation of a valid zoning by-law. *Lincoln v. Giles*, 317 Mass. 185, 57 N.E.2d 554 (1944). Each of the last four counts of the Complaint raises federal questions.

federal claims, and remanding the remaining state-law claims to the state Superior Court, 6 F. Supp.2d 70 (1998) (Petitioner's App. 27a-55a). On appeal, the Court of Appeals for the First Circuit affirmed the District Court's judgment, 199 F.3d 50 (1999) (Petitioner's App. 1a-26a).

B. The Record Below

Tyngsborough is a small, rural Town in northern Massachusetts, located approximately 40 miles north of Boston, on the New Hampshire border. The Town's population is approximately 9,500 people. (Petitioner's App. 3a, 30a). The Town has no downtown area, other than a small general store, town hall, tea room, doctor's office and fire station, and its business areas all immediately abut residential areas. (A.858). As both the District Court and Court of Appeals found, "Tyngsborough is a rural town in which the total acreage in the only commercial district that could properly be identified as the principal business district occupies very little of Tyngsborough's total acreage." (Petitioner's App. 23a, 44a).

Historically, the Town has played host to clubs which feature adult entertainment. A. 916. Pub 30 Something, a club which featured adult entertainment, offered adult entertainment for more than 20 years within the Town. (A. 916). An establishment called the Blue Moon has been licensed to offer adult entertainment for at least 15 years, and the Bell Ringer has offered adult entertainment, on at least one occasion. (A. 916). Moreover, Donato DiRocco, a principal of DHL, operated an adult entertainment business called the Tyngsborough Social Club from 1967 to 1992. (A. 642-43). It has been the Town's experience that clubs which offer adult entertainment generate a greater number of calls to the police than clubs that do not offer such entertainment. (A. 867, 947).

On February 10, 1994, Tyngsborough police discovered that DHL was offering nude dancing at its establishment known as "Bogies" (later known as "Mathews"), in violation of its live entertainment license. (A. 632). The Town's Board of Selectmen held a violation hearing and suspended DHL's liquor license for two days, which suspension was ultimately affirmed by the Massachusetts Superior Court. (A. 632, 643, 883).

Due to the illegal, unlicensed offering of sexually-oriented dancing by DHL and Pub 30 Something, a lead story in the *Boston Globe* declared that the Town, "an otherwise quiet suburb of 8,500," had more strip clubs in operation than Boston's Combat Zone. (A. 632, 643). This unwanted attention from major news media contributed to a tremendous public reaction to the illegal presentation of sexually-oriented entertainment by DHL and Pub 30 Something. (A. 868). Members of the Board of Selectmen received numerous telephone calls from residents concerned about the uncontrolled and unlicensed presentation of sexually-oriented entertainment resulting in an increase in crime. (Petitioner's App. 17a-19a, 39a-40a).

Upon receipt of the citizens' concerns, the Board of Selectmen instructed the town administrator and special counsel to "gather information about how other localities addressed adult entertainment and secondary effects issues." (Petitioner's App. 17a). Subsequently, on February 14, 1994, the Board of Selectmen held a public hearing to discuss the regulation of adult entertainment. (Petitioner's App. 31a). Approximately 75 citizens attended this meeting and expressed their concerns regarding the uncontrolled presentation of adult entertainment and the potential for an increase in crime. (A. 874-75, 887).

The Town held a Special Town Meeting on March 29, 1994. (A. 636-37). At this meeting, the Town unanimously voted to revise its zoning By-laws, by creating a new adult entertainment zone, comprising approximately 7.88 acres, and located in a commercial area with easy access to Route 3, a major interstate highway ("the 1994 zone"). (A. 636-37). DHL never applied for a permit to operate in this zone. (Petitioner's App. 82a, ¶47).

At its annual Town Meeting in May 1996, the Town voted to replace the 1994 zone with a *larger* zone, containing approximately 10.4 acres ("the 1996 zone").[2] (Petitioner's App. 5a). The 1996 zone is located within a commercially and industrially zoned area known as Applewood Commercial Park, which consists of five parcels located off of Route 3, a major interstate highway. (Petitioner's App. 5a, 83a-84a). Underground utilities are available to all lots in the 1996 zone, and all five lots are physically capable of hosting, at a minimum, a 15,000 square-foot building, with the exception of Lot 14, which could host an 8,000 square-foot building, which is approximately the same size as DHL's Mathew's. (A. 775, 779, 951). DHL has never made an offer to purchase or lease property located in the 1996 zone. (A. 787). Indeed, DHL has never even applied to operate in this zone. (A. 641).

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2. Although DHL originally challenged the validity of the 1994 zone as well as the 1996 zone, both the District Court and the Court of Appeals determined the validity of the 1994 zone to be moot. (Petitioner's App. 8a, 41a). DHL's Petition does not challenge the lower courts' determinations in this regard, and its challenge to the 1994 zone must, therefore, be deemed waived.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS PROPERLY DECLINED TO DISTURB THE DISTRICT COURT'S DISCRETIONARY DECISION TO DENY PLAINTIFF'S REQUEST FOR CERTIFICATION AND ITS DECISION IN THIS REGARD DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR ANY OTHER CIRCUIT.

A. There exist no novel, unsettled or dispositive questions of state law warranting certification and disposition of the plainly-stated federal claims was entirely consistent with decisions of this Court.

1. There exist no novel and unsettled questions of state law.

DHL incorrectly argues that certification was required because article 16 of the Massachusetts Declaration of Rights affords adult entertainment establishments broader protections from zoning restrictions than does the First Amendment. Massachusetts courts have had ample opportunity to identify such broader protections since this Court's decision in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), but have chosen not to do so. Instead, Massachusetts courts have chosen to apply *Renton* to cases involving article 16 claims, including those relied upon by DHL, thereby indicating its view that, in the context of zoning restrictions on adult entertainment, article 16 is coextensive with the First Amendment.

DHL relies primarily on two Massachusetts Supreme Judicial Court cases for the proposition that article 16 may be

broader in its protections of adult entertainment than is the First Amendment: *A.F.M., Ltd. v. City of Medford*, 428 Mass. 1020, 704 N.E.2d 184 (1999), and *T&D Video v. City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996). As discussed below, each case involved challenges to local zoning restrictions under both article 16 and the First Amendment, yet in each case, the Massachusetts Supreme Judicial Court professed to apply the federal standard under *Renton* to all claims.

a. *A.F.M., Ltd. v. City of Medford*

DHL's characterization of *A.F.M.* as a decision under the Massachusetts Declaration of Rights is incorrect. The *A.F.M.* decision contains *not one reference* to the state constitution. Further, *A.F.M.* explicitly purports to be decided under this Court's interpretation of the *federal* Constitution in *Renton*, and the decision cites only federal First Amendment cases as authority.

In addition, *A.F.M.* does not even stand for the proposition for which it is cited by DHL. DHL erroneously states that the *A.F.M.* court "held the regulatory scheme [there at issue] unreasonably foreclosed avenues of communication" based upon a finding that the challenged adult zone provided for only .11 percent of the city's developable land. (Petition, p.7). In fact, the Supreme Judicial Court did not rule on the ultimate constitutionality of the subject ordinance, but simply upheld a preliminary injunction because the defendant city did not, at the preliminary injunction stage, "present any information explaining why it was reasonable to restrict adult businesses to such a minuscule portion of the developable land in the city." *A.F.M.*, 428 Mass. at 1021, 704 N.E.2d at 186.

Unlike the defendant city in *A.F.M.*, the Town has, in the instant matter, provided abundant evidence in support of the reasonableness of its 1996 zone, including the rural character of the Town, its location and population, the relatively small area available for commercial uses in general, and the fact that a pre-existing adult entertainment establishment is already located in the Town. Based upon this record, both the District Court and the Court of Appeals held that the 1996 zone does indeed provide adequate opportunity for adult businesses to locate in the Town. (Petitioner's App. 22a-25a, 44a -47a).

DHL begs the question when it states, "if *A.F.M., Ltd.* sets forth state constitutional considerations and is not simply wrongly decided under the first Amendment, the percentage of land [available in the 1996 zone] is greatly important." The state Supreme Judicial Court's decision evinces exclusive reliance in *A.F.M.* upon federal jurisprudence, primarily *Renton*. Surely, the state court would not exclusively apply the First Amendment test if it considered article 16 to be in any way broader than the First Amendment in its protection of adult entertainment from local zoning restrictions. The simple fact that the Supreme Judicial Court may have misapplied federal law does not suggest otherwise.

b. *T&D Video v. City of Revere*

DHL also contends that the Supreme Judicial Court's decision in *T&D Video v. City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996), suggests that article 16 may provide adult entertainment with greater protections from zoning restrictions than the First Amendment. As it did with regard to *A.F.M.*, DHL has mischaracterized the unambiguous basis for the Supreme Judicial Court's holding in *T&D Video*.

In *T&D Video*, as in *A.F.M.*, the state court based its decision solely on First Amendment grounds, beginning its analysis by characterizing the case as "a First Amendment challenge," even though the plaintiff had also pled its claim under article 16. *T&D Video*, 423 Mass. at 580, 670 N.E.2d at 165. *T&D Video* discusses four federal cases, citing *not one* state case, and relying heavily on and purporting to clarify *Renton*. *See* 423 Mass. at 580-82, 670 N.E.2d at 165-66. In its two-page analysis of the constitutional question presented, the Court discusses and relies exclusively upon federal case law under the First Amendment. Nowhere in that analysis does *T&D Video* make any reference whatsoever to article 16 or otherwise indicate that distinct Massachusetts Constitutional considerations played any role in the Supreme Judicial Court's decision. Indeed, the only reference to article 16 in the entire decision is in its description of the plaintiff's claims. 423 Mass. at 578, 670 N.E.2d at 163.

Furthermore, like *A.F.M.*, *T&D Video* does not stand for the proposition for which it is cited by DHL. The Supreme Judicial Court did not, as DHL contends, create a new, heightened standard for determining whether a zoning restriction is designed to further a substantial government interest. (*See* Petition, p.6-7). Applying federal case law, the state court noted that a municipality may not rely upon "merely speculative factual grounds" and "[m]ere conclusions asserted after an ordinance's enactment regarding the secondary effects of adult entertainment." 423 Mass. at 581, 670 N.E.2d at 165 (quoting *Krueger v. Pensacola*, 759 F.2d 851, 855 (11th Cir. 1985). This language does not constitute, or even hint at, a stricter standard for reviewing adult entertainment zoning restrictions under article 16 than under the First Amendment.

Nowhere in *T&D Video* does the Massachusetts court purport to apply any standard other than the *Renton* analysis. While the Town agrees that *T&D Video* may have *mis*-applied that standard to the particular facts of that case, this simply does not create a novel and unsettled question of state constitutional law.

c. Other Article 16 Jurisprudence

DHL argues that it is unsettled whether Article 16 affords adult entertainment broader protection from zoning restrictions than the First Amendment. Repeated and established holdings of the Massachusetts Supreme Judicial Court belie that argument. Massachusetts' highest court has firmly established — and never disclaimed — the principle that article 16 is to be construed coextensively with the First Amendment, stating, "the criteria which have been established by the United States Supreme Court for judging claims arising under the First Amendment . . . *are equally appropriate to claims brought under the cognate provisions of the Massachusetts Constitution.*" *Opinion of the Justices to the House of Representatives*, 387 Mass. 1201, 1202, 440 N.E.2d 1159, 1160 (1982) (quoting *Colo v. Treasurer & Receiver General*, 378 Mass. 550, 558, 392 N.E.2d 1195, 1200 (1979)) (emphasis added). Therefore, certification in this instance would have been both futile and wasteful of the time and resources of the courts and the parties.

In an attempt to circumvent this established principle, DHL argues that three cases, "*Redgrave v. Boston Symphony Orchestra*, 855 F.2d 888 (1st Cir. 1988), *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), and *Cabaret Enterprises, Inc. v. ABCC*, 393 Mass. 13, 468 N.E.2d 612 (1975), indicate that article 16 provides greater protection for

adult entertainment than the First Amendment." (Petition, p.15). While these cases do establish a different application in article 16 cases where the Twenty-First Amendment is implicated, this difference in application is narrowly limited to the subject of regulating the service of alcohol in conjunction with adult entertainment.

Both *Sees* and *Cabaret* involved challenges to local and state legislation making it illegal to present nude dancing in liquor licensed establishments. In this context, both cases found that article 16 provided broader protection for nude dancing in nightclubs than the First Amendment, but only because, due to the Twenty-First Amendment, "federal courts must allow states 'broad powers . . . to regulate the sale of liquor [including the right to] ban nude dancing as part of [their] liquor license program,' " while Article 16 is subject to no such limitation. *Redgrave*, 855 F.2d at 918 n.4 (quoting *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975)) (Bownes, J., dissenting). This application is not pertinent and provided no support for certification here. Accordingly, it provides no basis for the grant of DHL's present petition.

2. Denial of plaintiff's request for certification is entirely consistent with decisions of this Court.

In arguing that the Court of Appeals erred in refusing to certify questions of state law to the Massachusetts Supreme Judicial Court, DHL asserts that the First Circuit's refusal to do so conflicts with this Court's decision in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997).[3] DHL's assertion is incorrect. In *Arizonans*, this Court vacated a decision

3. DHL argues that the Court of Appeals "ignored the holding" in *Arizonans*, yet DHL did not cite *Arizonans* in any of its briefs to the District Court or Court of Appeals.

of the Court of Appeals for the Ninth Circuit, which had invalidated a state constitutional amendment designating English as the state's official language, primarily on the ground that the controversy there at issue had become moot. 520 U.S. at 74-75. The Court also indicated that the lower courts should have certified to the Arizona Supreme Court the question of how to interpret the challenged amendment. *Id.* at 75-80.

The instant case is readily distinguishable from *Arizonans*: here the meaning and application of the legislation subject to challenge is not in dispute. In *Arizonans* this Court professed that certification would have been proper to permit the state court to rule on the *meaning* of the subject amendment. 520 U.S. at 76 (rejecting the lower courts' characterization of the subject amendment as "plain" in meaning). The reason for this approach is that the proper construction of a challenged legislative provision is a necessary question antecedent to review of such a provision's constitutional validity. Therefore, where state legislation is subject to disparate constructions, a federal court should not adjudicate that legislation's validity under the United States Constitution without the benefit of the state courts' opinion of the meaning of such legislation. *See Arizonans*, 520 U.S. at 80.

The adult entertainment By-law and the 1996 zone here in issue, unlike the state constitutional provision at issue in *Arizonans*, are not novel or subject to multiple constructions, and DHL does not allege they are. DHL alleges only that these restrictions are unconstitutional under the First Amendment and its state constitutional analogue, article 16 of the Massachusetts Declaration of Rights. As note above, the Massachusetts Supreme Judicial Court has indicated, both affirmatively in *Opinion of the Justices*, 387 Mass. at 1202, 440 N.E.2d at 1160, and by its omission of any independent reference to article 16

in *T&D Video* and *A.F.M.*, that article 16 is to be construed as coextensive with the First Amendment. Clearly, then, the reasoning employed in *Arizonans* is not apposite in this instance, and the Court of Appeals properly rejected DHL's argument for certification.

Absent from DHL's petition is any mention of the standard commonly applied to determine whether to exercise jurisdiction over federal questions in cases involving analogous state and federal constitutional provisions, *Michigan v. Long*, 463 U.S. 1032 (1983). In *Long*, this Court was presented with an appeal from a state court decision, which rested upon both federal and state law grounds. In determining whether to exercise jurisdiction over the federal question, the Court expressed its concern to ensure: "[r]espect for the independence of state courts, as well as avoidance of rendering advisory opinions." *Id.* at 1040. In order to replace the previously "*ad hoc*" method of addressing these concerns, this Court adopted the so-called "plain statement" test:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did *because it believed that federal law required it to do so* . . . "It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. *But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination*

> *by this Court of the validity under the federal constitution of state action.*" . . . [I]n determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.

Long, 463 U.S. at 1040-42 (citations omitted) (emphasis added).

The test set forth in *Long* is directly applicable to the District Court's decision to address the federal question presented here, where DHL bases its certification argument upon the unfounded assertion that *A.F.M.* and *T&D Video* were decided upon independent state grounds under article 16 of the Massachusetts Declaration of Rights. As discussed above, both *A.F.M.* and *T&D Video* relied exclusively upon federal law and applied the federal standard established in *Renton*. More importantly, neither case contains a plain statement, or indeed any indication whatever, that article 16 provided a basis independent of the First Amendment for the holdings therein.

In sum, Massachusetts courts have had ample opportunity to review *Renton* and its progeny and to determine whether to forge a divergent body of case law to afford adult entertainment protections broader than those of the First Amendment. The state courts have declined to do so, however, choosing instead to construe article 16 coextensively with the First Amendment. This question is hardly novel, fourteen years after *Renton*. *Compare Arizonans*, 520 U.S. 43 (concerning newly-adopted

amendment to state constitution, which state courts had not had opportunity to construe). Absent a plain statement by the Supreme Judicial Court to the contrary, therefore, the state and federal constitutional protections of adult entertainment must be construed as coextensive. Accordingly, the Court of Appeals properly declined to certify this question to the state court, and DHL's Petition should be denied.

3. The state law questions would not be dispositive.

This Court should also reject DHL's certification argument because the state law questions would not obviate the need for adjudication of the federal questions, insofar as DHL would have to succeed in its *federal* claims to obtain an award of attorneys fees and costs, as requested in the Complaint.

Under the federal Civil Rights Act, 42 U.S.C. §§ 1983 and 1988(b), a plaintiff may be entitled to damages, attorneys fees and costs if it can prove the violation by a state actor of a federally-protected civil right. (App. 1a-2a). Thus, if DHL were successful on its First Amendment claims, it might recover attorneys fees and costs,[4] which, after such protracted litigation, are likely to be substantial.

In contrast, the Massachusetts Civil Rights Act, Mass. Gen. L. ch. 12, §§ 11H and 11I ("MCRA"), requires not only proof that a plaintiff's rights have been violated, but that they have been violated by means of "threats, intimidation or coercion." (App. 2a-3a). To violate the MCRA there must be, in addition to the deprivation itself, "something akin to duress which causes the victim to relinquish [his] rights." *Butler v. RMS Technologies, Inc.*, 741 F. Supp. 1008, 1011 (D. Mass. 1990); *see, e.g., Freeman v. Planning Bd. of West Boylston*, 419 Mass.

4. DHL waived its damages claims prior to trial.

548, 646 N.E.2d 139, *cert. denied*, 516 U.S. 931 (1995). A direct deprivation of a secured right will not violate the MCRA if it "lacks the quality of coercion." *Butler*, 741 F. Supp. at 1011.

In this instance, DHL has made no showing that the Town violated its rights through use of threats, intimidation or coercion. Indeed, it is undisputed that the Town has not even enforced its adult entertainment By-law against DHL, pending the outcome of this litigation. (Petitioner's App. 6a-7a). Absent such a showing, DHL can only recover under the federal Civil Rights Act and not under the MCRA. Therefore, even if the actual validity of the 1996 zone could be adjudicated by the state courts separately and independently of First Amendment considerations, DHL's claim for attorneys fees and costs could not, and adjudication of the federal questions was therefore necessary to address these claims.

B. The plaintiff's untimely requests for certification comprise an improper attempt to manipulate the federal courts' jurisdiction to insulate from review by the federal judiciary state court interpretations of federal constitutional provisions favorable to the plaintiff.

The Supreme Court and lower federal courts are vested with jurisdiction over cases arising under the United States Constitution. *See, e.g., Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); 28 U.S.C. § 1331. As demonstrated above, and notwithstanding plaintiff's belated attempt to recast this case under the state constitution, this litigation primarily concerns claims under the First Amendment and 42 U.S.C. § 1983.

In light of the belated nature of DHL's first requests for the District Court to remand or certify state law questions and

the timing of these requests immediately following adverse rulings by the District Court, it appears that DHL's true strategic motivation was to shift this case to a forum more favorable to its position. Likewise, by admitting that the Supreme Judicial Court's rulings in *T&D Video* and *A.F.M.* conflict with *Renton*, but arguing that this Court should assume those cases to have been decided under the state constitution, DHL is attempting to manipulate this Court's sensitivity to issues of federalism for the purpose of preserving from review by this Court potentially erroneous interpretations of the First Amendment by the state courts. This Court recently expressed its distaste for such behavior and its "interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's, A.M. TDBA "Kandyland"*, __ U.S. __, No. 98-1161, slip op., 2000 U.S. LEXIS 2347, *23 (March 29, 2000). This interest would be ill served by permitting DHL to seek review of its fundamentally federal claims in the state courts. Accordingly, the lower courts' exercise of discretion in declining certification is consistent with standards articulated by this Court, and *certiorari* should be denied on this additional basis.

II.

THE COURT OF APPEALS APPLIED THE *RENTON* STANDARD CONSISTENTLY WITH HOLDINGS OF THIS COURT AND OTHER CIRCUITS.

DHL urges this Court to grant the writ on the basis that "the Court of Appeals failed to properly apply the substantial governmental interest and reasonable opportunity to open and operate tests under *Renton v. Playtime Theatres, Inc.*" (Petition, p.24). As a preliminary matter, the Town notes that the alleged failure of a lower court to "properly apply" a correctly-stated

standard is not an appropriate subject for *certiorari*. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings *or the misapplication of a properly stated rule of law*") (emphasis added).

It is not disputed that the Court of Appeals correctly stated the applicable rules of law in this case. Specifically, the Court of Appeals referred to *Renton* and first considered the appropriate level of scrutiny to be applied to the Town's By-law. In making this determination, the Court of Appeals, in accordance with *Renton*, inquired as to whether the By-law was "aimed at combating the secondary effects of nude dancing rather than the content of the message expressed by nude dancing." (Petitioner's App. 15a-16a, 20a-21a). Likewise, the Court of Appeals applied the proper standard in determining the constitutional adequacy of the 1996 zone[5] by inquiring "whether Tyngsborough's ordinance allows reasonable alternative methods of communication." (Petitioner's App. 21a).

These are the exact standards established in *Renton*. *See* 475 U.S. at 46. DHL's dissatisfaction with the *result* of the Court of Appeals application of these standards to the particular facts of this case does not raise an appropriate subject for review by this Court on *certiorari*. For this reason alone, the Court should deny DHL's Petition.

In any event, as discussed in greater detail below, the Court of Appeals did not misapply the *Renton* standard. The decision

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5. The Court of Appeals held that the validity of the 1989 and 1994 zones was moot, in light of its determination that the 1996 zone is constitutional. DHL has not addressed this holding in its Petition and has, therefore, waived this issue. *See* Sup. Ct. R. 14(1)(a).

below does not conflict with *Renton*, with any other decisions of this Court or with decisions of other courts of appeal. As such, no basis for the grant of *certiorari* exists.

A. The Court of Appeals properly affirmed the District Court's determination that the By-law was designed to combat the adverse secondary effects commonly associated with adult entertainment.

DHL's sole argument in support of its position that the Court of Appeals erred in determining that the 1996 zone was designed to further the substantial governmental interest of combating adverse secondary effects associated with adult entertainment is that any amendment of the By-law required new evidence of such secondary effects. (*See* Petition, pp.26-29). DHL argues that the considerations prompting the Town's adoption of the 1994 zone could not justify the adoption of a new zone in 1996. It further argues that the Court of Appeals' rejection of this argument below "not only misconstrues the purpose of *Renton's* substantial government interest requirement but also conflicts with two recent cases." (Petition, p.27). This Court should deny the petition because the Court of Appeals' decision is in accord with the decisions of this Court and because the cases upon which DHL relies are not apposite.

1. The Court of Appeals' decision does not conflict with the decisions of any other Circuit.

DHL relies upon two cases for its proposition that a conflict between the First Circuit's decision below and decisions of other circuits warrants further review by this Court. Both cases are readily distinguishable, in that each involved new enactments by the defendant-municipalities, which were substantially more

restrictive than the ordinances they replaced. *See J&B Entertainment, Inc. v. City of Jackson, Miss.*, 152 F.3d 362, 374 (5th Cir. 1998) (replacement of simple zoning restrictions on adult entertainment with complete *ban* on public nudity) and *N.W. Enterprises, Inc. v. City of Houston*, 27 F. Supp.2d 754, 771-72 (S.D. Tex. 1998)[6] (where new ordinance "increases locational restrictions on all sexually oriented businesses, expands the reach of signage restrictions, and adds new regulations affecting individuals working in sexually oriented businesses" and requires applicants for adult entertainment licenses to "publish newspaper notices warning the public of their applications").

In contrast to the cases cited by DHL, the Town did not increase its restrictions on adult entertainment, or otherwise substantially alter the nature of those restrictions, when it adopted the 1996 zone. To the contrary, the 1996 zone *increases* the number of lots and the amount of acreage available for adult uses and was actually adopted "for the purpose of making [the By-law] more likely to overcome constitutional challenge." (Petititoner's App. 10a). Certainly, a Town need not justify by new references to adverse secondary effects an attempt to provide *greater* opportunity for expression.

N.W. Enterprises is distinguishable for the additional reason that the district court's decision in that case emphasized the lengthy delay between the two enactments involved. Specifically, the city attempted to justify new restrictions adopted in 1996 by reference to evidence that it considered

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6. As a threshold matter, any purported conflict with a *district court* decision such as *N.W. Enterprises* does not warrant review by this Court. *See* Sup. Ct. R. 10(a) (referring to "conflict with the decision of another United States *court of appeals*") (emphasis added).

secondary effects in adopting a prior ordinance thirteen years earlier, in 1983. 27 F. Supp.2d at 804. In rejecting the city's contention in this regard, the district court distinguished a Fifth Circuit Court of Appeals case[7] that permitted the city to rely on the record of the 1983 ordinance to justify a 1986 amendment, "which was enacted *a mere three years* after the 1983 legislative record was compiled." 27 F. Supp.2d at 804 (emphasis added). Certainly, this holding is consistent with the First Circuit's holding in this case that, adopting the 1996 zone, the Town could rely upon considerations of secondary effects that prompted adoption of the 1994 zone just *two* years prior.

2. The Court of Appeals' decision in this case is consistent with the holdings of this Court and other circuits.

As demonstrated above, DHL's argument that the First Circuit's decision below is inconsistent with case law from other circuits is without merit. In addition, the petition should be denied because the First Circuit's holding that the 1996 zone was designed to address concerns regarding adverse secondary effects of adult entertainment comports with established precedent of this Court and other Circuits.

This Court recently reaffirmed the principle that municipalities may rely upon their experiences and knowledge regarding the well known effects of adult entertainment when regulating such entertainment. *See City of Erie v. Pap's*, *supra*, __ U.S. __, No. 98-1161, 2000 U.S. Lexis 2347, *39-40. In this instance, both lower courts found that the Town's regulation of adult entertainment was prompted by its experience that

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7. *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988), *cert. denied sub nom. M.E.F. Enterprises, Inc. v. City of Houston*, 489 U.S. 1052 (1989).

establishments offering such entertainment in Town generate more police activity than do other liquor licensed establishments and by stated concerns of Town citizens regarding the increase in crime that might be caused by such establishments. (Petitioner's App. 17a-18a, 40a). These considerations are no less relevant to the Town's adoption of the 1996 zone than they were to the adoption of the 1994 zone.

Further, the Fifth Circuit, the only circuit identified by DHL as being at odds with the First Circuit in this regard (*see* Petition, p. 27-29), has itself held that a municipality need not demonstrate that an amendment to an adult entertainment regulation was prompted by new considerations regarding secondary effects, at least where, as here, the amendment is not too remote in time from the previous legislation, and where the amendment is not substantially more restrictive. *See SDJ, supra,* 837 F.2d at 1273 ("Although the 1986 supplemental report relates no empirical evidence of the effects of topless bars, that report incorporates the 1982 report, which does refer to topless bars"); *see also DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410-11 (3rd Cir. 1997) (rejecting as irrelevant allegation "that much of the evidence of crime and health effects was developed after the enactment of the [challenged] amendment to the ordinance, and therefore is not evidence of the City Council's intent"); *Phillips v. Borough of Keyport*, 107 F.3d 164, 178 (3rd Cir. 1997) (same).

As demonstrated above, the First Circuit's decision below is in accord with the decisions of this Court and other circuits. Therefore, DHL's Petition should be denied.

B. The Court of Appeals properly affirmed the District Court's determination that the 1996 zone provides for a reasonable opportunity for adult entertainment establishments to open and operate.

DHL makes two arguments in support of its position that the Court of Appeals improperly held that the 1996 zone provides for reasonable alternative avenues for the presentation of adult entertainment: (1) that the Court of Appeals improperly determined the availability of land within the 1996 zone as of the date of trial; and (2) that the area within the zone is too small, as a matter of law, to satisfy *Renton*. Neither argument is supported by a reading of *Renton* or other decisions of this Court and other circuits.

1. The Court of Appeals' holding that land within the 1996 zone is potentially available comports with *Renton* and decisions of other Circuits.

DHL is wrong in its assertion that a municipality is required to inquire as to the availability of land within a proposed adult entertainment zone, prior to enacting such a zone.[8] (*See* Petition, p.24-25). This Court explicitly rejected this notion in *Renton*, when it stated that adult business "must fend for themselves in the real estate market, on an equal footing with other prospective

8. It is noteworthy that Walter Erikson, the owner of the land within the 1996 zone, testified "that if presented with the right price he . . . would sell to an adult entertainment establishment." (Plaintiff's App., 46a). It is undisputed that DHL never made a single offer to purchase or lease land within the 1996 zone, (A. 641), and it cannot argue that Mr. Erikson would not have entertained a reasonable offer from DHL had one been tendered. Therefore, any argument that land within the 1996 zone was not reasonably available prior to trial is wholly speculative and should not be credited by this Court.

purchasers." 475 U.S. at 54. *See also Woodall v. City of El Paso*, 49 F.3d 1120, 1125 (5th Cir. 1995) ("The Adult Businesses claimed that some sites were unavailable because the owner of the site probably would not rent or sell to an adult business, or because the building was currently occupied or leased, neither of which is of any obvious concern under *Renton*"). The only federal decision to suggest that actual availability is even a consideration stopped well short of endorsing the position urged by DHL. *See Topanga Press v. Los Angeles*, 989 F.2d 1524, 1531 (9th Cir. 1993) (property "is not 'potentially' available when it is unreasonable to believe that it would *ever* become available to *[any] commercial enterprise*") (emphasis added).

In reviewing the reasonableness of the 1996 zone, the Court of Appeals applied the same standard established in *Renton* and thereafter applied by all federal courts, to wit, whether the zone provides sites that are " 'potentially' as opposed to 'actually' available" for adult entertainment. *Renton*, 475 U.S. at 43. (*See* Petitioner's App. 23a). As DHL has failed to identify any inconsistency between the First Circuit's decision below and the decisions of this Court and other circuits, the petition is without merit, and the writ should be denied.

2. The Court of Appeals' fact-based finding that the 1996 zone provides for reasonable alternative avenues of communication for adult entertainment is consistent with the decisions of this Court and other Circuits.

DHL argues that "no court has upheld" an adult zone as small as that comprising the 1996 zone. (Petition, p.25). As the Court of Appeals noted, "D.H.L. misses the mark, however, in emphasizing this single factor." (Petitioner's App. 22a). In emphasizing this factor, to the exclusion of other relevant

considerations, DHL completely misconstrues applicable case law. *See North Avenue Novelties, Inc. v. City of Chicago*, 88 F.3d 441, 445 (7th Cir. 1996) ("acreage, standing alone, is largely irrelevant"); *Lakeland Lounge v. City of Jackson*, 973 F.2d 1255, 1260 (5th Cir. 1992) ("There is no requirement in *Renton*, *Woodall*, or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of lots be available).

The Court of Appeals acted in accord with other federal courts when it reviewed the adequacy of the 1996 zone in light of the character of the Town and the demand for sites to operate adult businesses therein. In contrast to the large-city defendants in the cases cited by DHL (Petition, pp.25-26 n.19), the Town is small, rural in character and without a large, central, commercial area. (*See* Petitioner's App. 23a). More importantly, "as a matter of arithmetic," *Woodall*, 49 F.3d at 1127; *Lakeland Lounge*, 973 F.2d at 1260, the five available lots within the 1996 zone more than satisfy any demand that DHL might have to relocate. It is also significant that the Town is permitting another adult entertainment establishment, which predates the By-law, to operate outside of the 1996 zone.

In upholding the 1996 zone based upon the size and character of the Town and the fact that the number of available sites exceeds potential demand therefor, the First Circuit followed the decisions of other circuits, which have found these to be determinative factors, and conformed with *Renton*'s "reasonableness" standard, which must be viewed in light of such factors. For this final reason, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX — RELEVANT STATUTES

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

* * *

42 U.S.C. § 1988(b)

§ 1988. Proceedings in vindication of civil rights

* * *

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this

title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

* * *

Mass. Gen. L. ch. 12 § 11H

§ 11H. Violations of constitutional rights; civil actions by attorney general; venue

Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth and shall be instituted either in the superior court for the county in which

the conduct complained of occurred or in the superior court for the county in which the person whose conduct complained of resides or has his principal place of business.

* * *

Mass. Gen. L. ch. 12 § 11I

§ 11I. Violations of constitutional rights; civil actions by aggrieved persons; costs and fees

Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages. Any aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.

* * * *

Supreme Court, U.S.
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(3)

No. 99-1536

IN THE

Supreme Court of the United States

D.H.L. ASSOCIATES, INC.,

Petitioner,

v.

JOHN O'GORMAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

In this Reply, the petitioner responds to three arguments made by the respondents in their Brief in Opposition ("Opposition") that are claimed to support the decision of the federal courts to address the federal constitutional claims and withhold decision on the potentially dispositive state claims that may render the federal decision advisory:

(1) that a claim for attorneys' fees requires a federal court to decide federal constitutional questions on which the court otherwise would abstain, Opposition, pp. 15-16;

(2) that it was proper for the federal courts to decline to certify the state issues because the questions were settled and not novel, Opposition, pp. 6-10; and

(3) that the jurisdictional standard in *Michigan* v. *Long* governs certification. Opposition, pp. 13-15.

I. A Decision in Petitioner's Favor on the State Law Issues Would Resolve the Entire Case, Including Claims for Attorneys' Fees and Costs, Without the Need to Address the Federal Constitutional Questions.

The respondents contend that certifying the state constitutional questions to the Massachusetts Supreme Judicial Court would "not obviate the need for adjudication of the federal questions . . . [because] DHL would have to succeed in its federal claims to obtain an award of attorneys [*sic*] fees and costs. . . ." Opposition, p.15. This contention simply is wrong as a matter of law.

When a case involves both state and 42 U.S.C. § 1983 claims, a plaintiff is entitled to an award of attorneys' fees under § 1983 when the case is decided solely on the basis of a state claim as long as the federal claims are substantial and arise out of a "common nucleus of operative fact." *Maher* v. *Gagne*, 448 U.S. 122, 132 n.15 (1980)(citations omitted). *Johnson* v. *Commissioner of Public Welfare*, 419 Mass. 185, 187, 643 N.E.2d 444 (1994)(same); *Crane* v. *Commissioner of Public Welfare*, 400 Mass. 46, 49-50, 507 N.E.2d 751 (1987)(same).[1]

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[1] Like certification, the *Maher* rule furthers the goal of vindicating rights "without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." *Maher*, 448 U.S. at 133 (citations omitted).

Here, the federal courts and the parties all agree that the state and federal constitutional claims arise from the same operative facts and that the latter claims are substantial. Accordingly, if the state constitutional law questions were reached and resolved in the petitioner's favor, the entire case — including the attorneys' fees issue — would be resolved without the need for any court to address the federal constitutional questions.

II. The State Constitutional Questions Are Either Novel or Involve An Unsettled Area of Law, and Therefore, Are Appropriate Issues for Certification, Otherwise Both the District Court and the Court of Appeals Would Have Decided Them.

After reaching the First Amendment issues, the district court remanded the state constitutional questions to the state courts for adjudication. The respondents did not contest this order, and the Court of Appeals let it stand.

Accordingly, the respondents' claim that the state issues are neither novel nor unsettled is clearly frivolous. If the issues were clear and settled, the lower federal courts would have decided them. *Clay* v. *Sun Insurance Office*, 363 U.S. 207, 209-10 (1960).

Indeed, District Court Judge Keeton explained during the trial of this case that he was reluctant to decide the case on state constitutional grounds precisely because Massachusetts' article 16 juris-

prudence in this area of adult entertainment is unsettled. Petition for a Writ of Certiorari ("Petition"), pp. 8-9, Appendix, p. 75a.[2]

III. The Court of Appeals Applied the Wrong Standard to Determine Whether the Federal Constitutional Issues Should Be Decided While Leaving Open for Adjudication by the State Courts the State Issues Which May Be Dispositive and Would Render the Federal Opinion Advisory.

In its decision, the Court of Appeals stated without citation that "[b]ecause we are not convinced that state law provides an independent and sufficient basis for deciding the case," the district court did not err by declining to certify the state law questions. Petition Appendix at 25a. The phrase "independent and sufficient basis" arguably conjures up the jurisdictional standard of *Michigan* v. *Long*, 463 U.S. 1031 (1983), where this Court articulated the test for determining whether the federal courts should exercise jurisdiction over a federal question when a state's

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[2] The respondents also mention timeliness. Opposition, pp. 2, 16-17. The remand and certification motions were decided on the merits. Timeliness was not a consideration. In any event, the motions were timely, prompted by the decisions of the Supreme Judicial Court in *T & D Video* v. *City of Revere*, 423 Mass. 577, 670 N.E.2d 162 (1996) and *A.F.M., Ltd.* v. *City of Medford*, 428 Mass. 1020, 704 N.E.2d 184 (1999), which were decided two and five years, respectively, after this case was filed by the petitioner in state court and removed to federal court by the respondents.

highest court has decided the case arguably under both state and federal law grounds. *Long* held that a federal court may not reach the federal question in such circumstances if the state court's state law decision is based on adequate and independent state grounds appearing plainly in its written decision.

In their brief, the respondents faulted the petitioner for failing to mention the *Long* standard in its Petition. Opposition, pp. 13-14. *Long's* holding, however, has no application to the present case. The tests for certification are the related threshold questions whether the state law issues are unsettled and whether resolution of the state law questions *may* dispose of the case, *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 78-79 (1997) — not whether the state law provides an adequate and independent basis for deciding the case. No basis for certification exists if the state law is reasonably clear. The federal court simply would, as all federal courts routinely do, decide the state claim. By applying the *Long* test to the certification question, the Court of Appeals erred.

CONCLUSION.

For the above reasons, and for the reasons stated in its Petition, the petitioner respectfully requests that this Court grant certiorari to resolve the important question of when federal courts should decide federal constitutional issues, but

leave unresolved for remand the potentially dispositive state law claims.

Respectfully submitted,

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